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Supreme Court of the United States.

No. 413. October Term, 1895.

CHARLES DAVIS,
Plaintiff in Error,

against

THE ELMIRA SAVINGS BANK,
Defendant in Error.

Brief by way of Answer to the Argument for the Plaintiff in Error.

HARTMAN & CADICK, PRS.

Supreme Court of the United States.

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The learned counsel for the plaintiff avails himself of the similarity, in some respects, of the language of the Federal statute and that of the State of New York, and says, what the form of the legislation apparently justifies, that the law of New York and the act of Congress "both express a command to the winding-up officer as to what he shall do" with the property of the bank. He does not deem it important to inquire into the objects and purposes which the legislation of Congress and of the State respectively had in view, but, standing on the letter alone, assumes them to be simply commands, either of which would be entirely valid and enforcible if they stood alone, but both of which cannot stand together, inasmuch as they are *commands* to the winding-up officer to do different things with the same property. He therefore makes the question to be simply which of these two commands must prevail, and finds an easy solution of that question in the constitutional declaration of the supremacy of Congressional law as against State law.

It is respectfully submitted that this reasoning is entirely erroneous. We must look beyond the mere *form* in which the statutes are framed and inquire into the *objects* and *purposes* which they respectively had in view, and the *intentions* of the Legislatures which enacted them. Adopting this method it becomes immediately obvious that the United States law does not, in the sections under consideration, assume to deal in any particular with the *transactions* in which the bank may engage. It does not undertake to prescribe what banking business it may, or may not, engage in, what contracts it may, or may not, make, or what liabilities it may, or may not, assume. So far as the banking business is concerned the National Banking Act simply creates the National Banks and leaves them to engage in ordinary banking business in the several States in the ordinary way in which that business is carried on under State laws. It does not deal with them at all as *going and operating concerns*, with one exception, and this is hardly an exception, namely, in the prohibition contained in Section 5242 of certain transactions "after the commission of an act of insolvency or in contemplation thereof." The dealing of the various sections of the United States law, which are the subject of consideration in this case, with the bank begin at the point of *insolvency* of the bank. The principle if not the sole motive, for its interference at this point is the full protection of the Government against the liability assumed by it for the payment of the circulating notes. In order to make its security perfect the Government, through an officer appointed by it, takes possession of all the assets of the bank of every description, and, after repaying to itself any moneys which it may have been compelled to pay out by way of redemption of the circulating notes, distributes the residue among those to whom that residue in equity belongs, namely, the creditors. It is no part whatever of the purpose of this legislation to *create*, *alter* or *modify*, or *in any way to affect* the liabilities or obligations of

the bank to its creditors generally. It assumes that those rights and obligations are *already created and established* by the acts of the parties under existing law, and that all that is to be done is for the Receiver or Comptroller to pay over the surplus assets to the persons to whom the same by law belong. If no such directions were given to the Receiver or Comptroller the law would in some form enforce the doing of the same thing. The statute simply directs the officer having charge of the assets to distribute them according to *existing rights*. *This* law, therefore, is what the learned counsel for the plaintiff in error declares it to be, simply a *command*. To direct a person to do what the law already requires to be done—to direct an officer having the custody of the assets of an insolvent bank to distribute the same among those to whom in right and equity they belong is the proper subject of a command. The object of the statute in this respect is not to create or affect *rights*. It assumes the rights to be *already in existence* and undertakes to satisfy them.

Turning now to the State legislation it will be perceived that it differs from the National statutes *toto coelo*. The National statute is an *insolvency* statute which undertakes, and only undertakes, to distribute the assets of the insolvent among those legally entitled to them. The *State* statute is in no sense an *insolvency* statute. It has nothing to do with insolvency as such. It is no part of any legislation providing for the treatment of insolvency. It does not begin its dealings with the National or State Banks at the point of insolvency. The subject of its dealing is solely the *business and operation of savings banks*, and with their business and operation while *solvent and going concerns*. Its direct object, differing totally from that of the National legislation, is to *create* obligations which would not otherwise exist. It does not act on the assumption that the obligations are already created. Its simple and sole purpose is to prevent savings banks from making deposits of their moneys in ordinary banks of deposit, whether State or National, except to cer-

tain amounts and upon conditions which will insure them a preference over other depositors in case of the insolvency of the bank of deposit. This law therefore is in no sense a *command* for the distribution of assets. The purpose it has in view would not be effected if it were a command simply for such distribution. Rights over property cannot be created by the command of the Legislature, unless the Legislature were an absolute despot, or were dealing with its own property. But laws may be made in the form of command which will be applicable to *future transactions*, and may shape the form of future transactions and prohibit such transactions from being made in any other form, and, in such cases, *rights* will be created, not because the Legislature has created them by the mere instrumentality of a command, but because parties by their *acts* subsequent to the legislation, and which must necessarily conform to the law which governs them, create the right. It is submitted, therefore, that the learned counsel for the plaintiff in assuming that this legislation by Congress and the State, respectively, are mere commands effective as such to *create* rights, and which would each be valid and effective to that end if they stood alone, is totally erroneous. The National legislation is in the nature of a command simply to distribute assets. The State legislation is entirely different, being aimed to create rights by prohibiting transactions except as shall have a prescribed character.

When these two pieces of legislation are thus considered it is seen that one is an *insolvency* statute merely, dealing with the affairs of National Banks after they have ceased to be effective agencies and are simply to be wound up; and the other a statute, dealing not at all with National or even State banks of deposits, but simply with *savings banks*, and with these while they are operative and going concerns, and all conflict between them disappears.

The error above-mentioned of the learned counsel infects all his reasoning and renders his conclusion illegitimate.

But there is another one less vital indeed, but which should be pointed out. He perceives clearly enough that his view of the effectiveness of the command of the Federal statute to distribute the assets equally would, if literally carried out, absolutely destroy all equitable assignments, liens, or trusts affecting the assets of National Banks in favor of particular persons—a consequence which he knows could not for a moment be admitted—and he therefore says (p. 7): "It is the property *of the bank only* to which they both relate. Equitable liens, equitable assignments, mortgages, contracts, etc., affecting the property of the bank held by, or made to, others than the bank are not the property of the bank and do not go to the winding-up officer." He thus limits the operation of the National, as well as the State, statute to the property of the bank which remains after any preference arising from liens, equitable assignment, trust, etc., shall have been satisfied. This position would be quite enough for all our purposes, for if we are entitled to an equitable lien upon the assets it would have to be satisfied before anything passes into the hands of the National Receiver. The whole brief, however, of the learned counsel, proceeds upon the tacit and veiled assumption that nothing has gone, *in this case*, into the hands of the National Receiver except the assets of the bank *after* the satisfaction of all equitable liens, etc, if any existed. This is not true. What the Receiver has actually acquired is the assets of the bank of every description before the satisfaction of our equitable lien, if it exists, and, therefore, upon the view of plaintiff's counsel himself, if we have an equitable lien it follows that the Receiver has in his hands property to which he has no right under the law, and this action is a perfectly sufficient one for the purpose of recovering it. In ordinary cases the Receiver, whether appointed by an executive or judicial authority, takes possession of all the property of which the debtor was in possession, and if any of it is encumbered with

liens, either redeems it by the payment of the amount of the liens, or sells it subject to the liens, or where such authority exists sells the whole and pays the amount of the lien out of the proceeds.

It may be that there is in the generality of the language of the Federal statute some uncertainty and confusion as to just what is contemplated as passing into the hands of a receiver. This is very common in all administrative statutes. The detailed directions given in order to carry out the main object contemplated are not always entirely clear and distinct. Whenever this is the case, courts dispose of any difficulty arising from the uncertainty by applying to the statute a reconciling construction so as to enable it to fulfil its main purpose and intent.

These observations upon what are conceived to be the principal errors in the reasoning of the learned counsel for the plaintiff will enable the main position of the defendant in error to be re-stated quite concisely.

First ;—the question of the validity of the claim in this case of the savings bank depends wholly upon the question whether by the deposit of the funds of that bank in the Elmira National Bank a *right* was acquired by the savings bank to a repayment of its deposit, in case of insolvency, in preference to other creditors of the National bank. It is immaterial by what terms the right may be designated, whether as an equitable lien, assignment, or trust. The only question is whether the *right* was acquired. If so acquired the law in some form must enforce it.

1. Several circumstances bearing upon this question do not admit of a doubt. At the time the deposit was made the

National bank was in *full operation and solvency;* had perfect power of contracting; perfect control over its own assets, and could have made a contract giving to a savings bank in consideration of a deposit to be made by it just such a preference as the one under consideration.

2. If this were not true it would be impossible for any National bank to borrow any money upon pledges or security of any kind. The power to enter into such transactions depends upon the circumstance that the bank entering into them is engaged in banking business just as ordinary individuals are, and has the same control over its assets.

3. The authorities upon Mr. Herendeen's brief fully support the proposition, especially Scott *v.* Armstrong, 146 U. S., 499; Clark *v.* Iselien, 21 Wall., 360; Chemical National Bank *v.* Armstrong, 59 Fed. Rep., 372.

4. Nor is it open to doubt that the purpose of this State statute was not to deal with State or National banks, as in cases of insolvency, but to deal wholly with *New York savings banks*, and to forbid them from making any deposits in banks of deposit except under conditions which should secure preference for payment out of the assets of the banks of deposit.

5. Nor is it open to doubt that if a National bank were precluded by binding National law from allowing any such preference that any deposit of moneys in such banks by a

savings bank would have been unlawful, both on the part of the savings bank making the deposit, and on the part of the Federal bank receiving the same. Otherwise the State of New York would be incapacitated from protecting in the manner it thought necessary the interests of its people who were depositors in savings banks.

6. No pretence is made—none can be made—that the legislation of New York is in any respect invalid when treated in the light in which we view it as intended to *regulate the transactions* of savings banks.

7. The State of New York could not, by any mere act of legislation, create a preference in favor of the deposits of savings banks in any other bank; and this for the plain reason that the State of New York is neither an absolute despot nor does it own the assets of banks of deposits. If it could thus create a preference it might create it in favor of deposits of savings banks made *before* the law was enacted, which would be simply taking one man's property and giving it to another. Plainly the New York statute is operative to create the preference only in respect to deposits made *after* its enactment.

And why is it effective in creating a preference in respect to deposits made after its enactment? Simply for the reason that all deposits by savings banks being made under the law, both the depositing and the receiving banks act under a presumed knowledge of the law, and are presumed to give their *assent* to the conditions which it imposes. We have here, therefore, all the conditions of a valid obligation resting upon *assent*, and therefore resting upon *contract*.

8. We admit that if the lien thus asserted is forbidden by the law of the United States such prohibition would be effective, although in the absence of it it would be perfectly created; but it is certain that if it is forbidden by the law of the United States it must be for the reason that such a *deposit* is forbidden. If the *transaction* can be *lawfully* entered into it creates a *right*, and if the right be created, it is beyond the *power* even of the Congress of the United States to take it away. The only way, therefore, in which the *lien* can be prohibited is by prohibiting the *transaction* out of which it arises. No such prohibition is contained in any legislation by the United States.

a. That no direct or express prohibition is anywhere to be found all will agree, but we admit that direct prohibition is not requisite. *Indirect* prohibition would be equally effective; but this, also, is nowhere to be found unless it is in the command in respect to the equal distribution of the assets. This command does not prohibit the *transaction*. The learned counsel for the plaintiff in error expressly admits this. He says that "Equitable liens, equitable assignments, mortgages, contracts, etc., affecting the property of the bank, held by or made to others than the bank, are not the property of the bank and do not go to the winding-up officer." But we do not rely upon this admission. The United States statute does not *affect* to deal with the *transactions* of the bank in any particular as a going and operating concern. Still less does it affect to deal with the way in which the deposits of savings banks may be made. The sections in question are simply an insolvency statute passed in recognition of rights already established and not seeking to create new ones. The equal division which these sections command to be made among creditors is that equal distribution which the law would require if the command were not made. The scheme of the United States banking law wisely

contemplated Federal control over the banks it created only to that extent which was necessary in order to maintain them as efficient agencies for the National purposes for which they were created. In order to make them such efficient agencies for National purposes it was necessary that they should be permitted to engage in the ordinary business of banking in the several States in competition with the banks of those States. Congress in thus putting them forward as competitors with the State banks in ordinary banking business did not seek to give them any privileges over State banks, or subject them to any burdens not imposed upon the State banks. Congress simply endowed these creatures of its legislation with capacities for performing part of the business of the States in which their operations were to be carried on, and of course it did not intend to thrust them into the system of State affairs as anomalous institutions carrying on business in pursuance of powers and under the control of regulations entirely different from those of other similar institutions. In all respects except those in which Congress thought it necessary to legislate for the purpose of securing their efficiency as agencies for National purposes they were left just as all other persons, natural or artificial, are left, subject to the control of the laws of the States in which they undertake to act. (Western Union Telegraph Company *v.* Mass., 125 U. S., 530; Waite *v.* Dowley, 94 U. S., 527.)

But why argue what is so clearly self-evident. Is it not plain that if the requirement in the National statute of the equal distribution of assets prohibits the granting by a savings bank of any such equitable lien or preference it equally and alike prohibits every contract of a National bank for the borrowing of money upon the faith of any equitable lien upon its assets? Such a position no one will take.

9. These deposits, therefore, by savings banks under conditions giving them liens or preferences being lawfully, under

the laws of the State, assented to by the banks concerned who have full control over their operations and perfect liberty of making contracts, are not prohibited by Federal law and are valid and effectual.

10. This same conclusion may be reached by a pathway slightly different, but which yet depends upon the same reasons. The learned counsel for the plaintiff in error has given in an appendix to his brief a valuable compendium upon the legislation, both State and National, affecting the question. He has shown that the original legislation upon which the present statute of New York was founded was enacted in the year 1853. (See plaintiff's brief, Appendix, p. v.) This was an act entitled "An act relative to Savings Banks or Institutions for Savings in the City and County of New York and the County of Kings." It is provided for the method in which the moneys deposited in such savings banks should be invested, in what securities, etc. It further provided that temporary deposits might be made to the amount of ten per cent. on its capital, and then enacted as follows: "Section 4. All the assets of any bank or banking association now or hereafter to be created that shall become insolvent shall, after providing for the payment of its circulating notes, be applied by the directors thereof, *in the first place*, to the payment of any deficiency that may arise on the sales of the securities aforesaid and thereafter of any sum or sums of money deposited with such banking association by any savings bank or institutions for savings, within the range of 20 per cent. as provided in the second section of this act."

Here we have the original of the present State legislation, in which its essential provisions are made applicable to the counties of New York and Kings alone. Of course, no one

can doubt the entire validity of this legislation, and that a deposit of money made by a savings bank after its enactment created the lien and preference designed by it; and created such a lien, not simply and solely because the law commanded it, but because parties made deposits in presumed accordance with the provisions of the law.

Subsequently the essential features of this legislation were made applicable to all the savings banks in the State. After the National banks came into existence it was doubtful whether there was any permission to savings banks to make deposits in them. This doubt was removed by the passage in 1865, of an act, consisting of one section only, enabling such deposits to be made, but, of course, according to the terms of existing legislation, which was in no manner affected by the passage of this act. (See plaintiff's brief, Appendix, p. x).

Subsequently in the year 1875 a general savings banking law was passed embracing the permission to make deposits both in State and National banks, and also the provision calling for preference for such deposits. In 1882 a law relating to all banks was passed which contained the same provisions, which last law was repealed in 1892, when a new and revised general banking law was enacted by way of substitute and which contained both the provisions in the form in which they are now before the court.

How it is possible to contend that it was any part of the purpose of the National banking law to interfere in any manner with the policy of the State of New York in adopting those precautionary provisions in respect to temporary deposits by its savings banks which it thought necessary for the security of that large class of its people whose moneys were under the care and control of State banks?

11. Surely if Congress intended in any manner to prevent

transactions by National banks, the result of which would be to give a lien or preference upon its assets, in case of insolvency, to any class of depositors, it would have prohibited such transactions *directly*, and not through the indirect and doubtful medium of a command applicable only in cases of insolvency and after the bank was precluded from engaging in any further transactions whatever, that its assets should be converted into money by its receiver and be ratably distributed among its creditors.

And that it did not intend any such prohibition is directly confirmed by the fact that where it did intend to prohibit transactions by which a preference should be made in favor of one creditor over another it carried out such intention by an express prohibition of the transactions themselves. (See U. S. R. S., Sec. 5242, in Mr. Herendeen's first and general brief, p. 36.)

Second;—It can hardly be necessary, after the above, to resort to general considerations, but there is one so important that attention should be especially drawn to it. It appears that the State of New York has for the period of upwards of forty years adopted a policy, necessary, in its judgment, to the protection of that large class of its people who deposit their savings in banks created for that purpose, to limit the extent to which those moneys can be deposited in an ordinary banking institution to a very moderate amount and to give a preference for their repayment in case of insolvency of the banks of deposits. Certainly it cannot be assumed without the clearest evidences that the Congress of the United States has intended to interfere with that salutary policy. Every presumption to the contrary should be made, and any legislation should be construed, if it reasonably can be, so as to

prevent such interference. If there were any real and apparent inconsistency between the legislation of these different governments, a resort to this, the sound rule of interpretation, would remove it. Happily, however, in the present case such a resort is unnecessary.

Third;—The learned counsel for the plaintiff has made a labored effort to show that laws are never imported into contracts, and has mainly relied for this purpose upon some observations of Mr. Chief Justice Marshall in the case of Ogden *v.* Saunders, not necessary to the decision of the case and not concurred in by his brethren. It is hardly worth while to follow the learned counsel with a detailed criticism of the views expressed by him on this question. It is enough to say that by numerous recent decisions of this court, cited in the briefs of Mr. Herendeen, it is fully established that laws are imported into, and become parts of contracts. We may add, however, that the statement that laws become *parts of contracts* is in some respects obscure. But what can not be doubted by any one is, that when laws are enacted which are *designed* to govern the character of transactions in the nature of contract, and contracts to which such laws are applicable are entered into *after* their enactment, such contracts can be interpreted only by reference to such laws, and in this sense it is absolutely certain that the laws are imported into and become part of the contract made under them. But when laws are enacted which are not designed to shape and regulate the terms of contract, then they will not have that effect. This is in general the case with pure insolvency laws. The object of these is not to regulate the transactions of *solvent men or corporation*, not to *create* rights over property, but to administer and distribute assets in accordance with *previously cre-*

ated rights after such men or corporations became incapacitated from making further contracts. This was the case with the law in respect to which the observations of Chief Justice Marshall were made.

What is the sense or meaning of the universally established rule that contracts are to be interpreted according to the law of the place where they are made or to be performed, unless the law is to be regarded as part of the contract, in the sense that contracts cannot be interpreted without reference to the law?

JAMES C. CARTER,
Of Counsel for Defendant in Error.

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Supreme Court of the United States.

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CHARLES DAVIS,
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Defendant in Error.

Supplemental Brief for Defendant in Error.

EDWARD G. HERENDEEN,
of Counsel.

Supreme Court of the United States.

No. 415.

CHARLES DAVIS,
Plaintiff in Error,

against

THE ELMIRA SAVINGS BANK,
Defendant in Error.

Supplemental Brief for Defendant in Error.

In addition to the briefs already filed for the defendant in error herein, and by way of reply to the new brief for the plaintiff in error recently filed by Mr. Paige for the re-argument, counsel for the defendant in error suggests the following points for the consideration of the Court:

First.—The entire argument for the plaintiff in error as it now appears, is based upon an utter misconception of the position taken by the defendant in error and by the courts below. The argument made in behalf of the defendant in in error does *not* assume that the law of New

York is in conflict with the act of Congress, nor does it in any way, directly or indirectly, admit such conflict, but quite the contrary. We, of course, do not concede that if these laws are in conflict, the State law must necessarily fall, but our main fundamental proposition is that these two laws are not in conflict. The construction of the national bank act by the Supreme Court of the United States becomes of course part of the act itself What this law is, this court has declared in Scott v. Armstrong, 146 U. S., 499. On the other hand the Court of Appeals of the State of New York has in the principal case declared what this New York State law really is. The defendant in error claims that this New York State law as declared and construed by the highest court of that state, is not in conflict with the federal law as declared and construed by the Supreme Court. Whether there is a conflict is the first question to be considered here. If there is no conflict, the argument need proceed no further.

Second.—Mr. Paige's new brief in effect makes certain concessions, and admissions of certain propositions, to which the defendant in error devoted considerable attention in its general brief herein, which concessions and admissions narrow the debatable ground between the parties considerably. Briefly stated, they are,

a That the national bank act recognizes all valid contracts, pledges, liens, or, as in this

case, equitable assignments, as not in the slightest degree interfered with by the provisions of said act requiring ratable dividends and forbidding preferences. Accordingly.

b. Under the national bank act, the Elmira National Bank had the right at the time it received these deposits, to make an equitable assignment of all its assests as security for their re-payment.

c. If such equitable assignment were in fact made, the same will be respected by the Receiver of the Bank and by the Comptroller of the Currency.

So much for the national bank act

Turning our attention to the State law in question, it is conceded,

d. That the Savings Bank had the right to make such a contract with the National Bank.

e That the legislature of the State of New York had the right to require such a contract to be made as a condition of permitting savings banks to deposit with national banks, and

f. That the state law in question applies to national banks.

It admits of no argument and is tacitly conceded that this court will if possible avoid declaring the state law unconstitutional; will endeavor to reconcile the statutes; and will adopt if possible the construction of the state court declaring the laws in question to be in harmony with each other.

Eliminating, therefore, from the discussion, the propositions to which both parties consent, we make point

Third.—The highest court of the State of New York is the final tribunal on the construction of the statutes of that state. Its declaration of what a state statute is, becomes a part of the statute as much as the text. We do not understand that this proposition is disputed by the plaintiff in error.

This Court speaking by Mr. Justice Field in the case of Christy v. Pridgeon, 4 Wall, 196, quotes with approval the opinion of the court in the case of Shelby v. Guy, 11 Wheat., 367, as follows:

> "Nor is it questionable that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction."

And says, "The interpretation within the jurisdiction of one state becomes a part of the law of that state, as much so as if incorporated into the body of it by the legislature. If therefore different interpretations are given in different states to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one state from what it is in the other."

Fourth.—Both the courts below have in effect declared this law and in view of their declarations, we may paraphrase that law as follows:

Savings banks may deposit in national banks only upon the condition that at the time of such deposit as security for its re-payment in the event of insolvency, an equitable assignment of the assets of the national bank shall be given to such depositor. The assent of the national bank to this agreement shall be deemed to have been made by its reception of such deposit and the act of deposit shall complete the contract between the parties.

This was the law of the State of New York at the time this deposit was made, for so its courts have declared and their construction is conclusive. As said by Mr. Justice Merwin in the New York General Term pronouncing the unanimous opinion of that Court :

"In the present case it must be presumed that the National bank when from time to time it received the deposits from the Savings

bank, knew of the law which authorized such deposit and provided for the preference. The Savings bank was not bound to deposit in that particular bank, nor was the latter bound to receive the deposit, but if the one made and the other received the deposit, it must be assumed that both parties then intended that the security provided for by the statute should at the proper time be operative. There was then in effect a contract that if the deposit or loan was made, the security should be given. This was a part of the transaction in each case of deposit."

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The Court of Appeals in affirming the General Term, speaking by Judge Gray, said :

We are not now concerned with questions of the propriety or justice of the state law, in directing the claims of Savings banks to be preferred in payment over those of other depositors. That is the law of the state, enacted by its legislature in furtherance of the protection and security designed to be afforded to the savings of the people and if the inhibition of section 5242 of the U. S. Revised Statutes does not extend so far as to prevent its operation in such a case, it must be given its full effect. That effect would be to preserve and enforce a right or preference, which had accrued to the Savings Bank, in making deposits of its funds with the National Bank and which will be deemed to have been in the contemplation of the parties and assented to. Their contractual relations were necessarily influenced and shaped by the provisions of this public law, which gave to that class of depositors a superior claim or lien to that of other depostors or creditors upon the property of the bank * * * * *

> If in the course of its (the National Bank's) business, through force of state laws, rights are accorded to, or liens are acquired by, depositors or creditors, they are not within the purview of sections 5236 or 5242 * * * * * * With respect to its contracts, its rights and remedies, they may, in general, be subject to, or based upon, state legislation, without imparing their efficiency as national institutions * * * *
>
> In the present case, while a going concern, it (the National Bank) entered into an engagement with the Savings Bank which the state law required and regulated, which vested in the latter superior rights or equities, and which in the possible event of future insolvency would give to it a prior claim to payment from the assets."
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> Pages 18–19.

Fifth.—This being the law of the State of New York, the remaining question to be considered, is whether such a contract, concededly valid if made, was actually made by operation thereof when the act of deposit took place. Here again both of the Courts below have decided, and their language need not be further quoted, that such a contract was in fact made by operation of law. And we urge again, in spite of all that has been said by Mr Paige upon this subject, that this law of the State of New York forms a part of the contract between these parties as if fully set forth therein, and that their contract is deemed in law to be made with reference to and conditioned by existing law which forms a part thereof.

This brings us to a consideration of whether the remarks made by Mr. Chief Justice Marshall in the case of Ogden v. Saunders, to which remarks so much space is given by Mr. Paige, constitute in fact the present law upon this subject. Whatever else may be said for this opinion, the counsel for the defendant insists that so far as the doctrine that exisiting law does not enter into and form a part of a contract, is concerned, Mr. Chief Justice Marshall was not delivering the opinion of the Supreme Court, and that so far as that case was concerned, his argument in this respect is pure *dicta* and has so been considered by this Court ever since. As said by one of the text writers upon contracts, speaking of this argument, "It certainly is very nice, and when critically examined becomes almost evanescent." It was in some respects a dissenting opinion and it has long been settled that the opinion of the Court in that case was delivered by Mr. Justice Johnson, and the case has been cited many times as authority for holding simply, that although as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior contracts, yet as against creditors citizens of other states, it is invalid as to all contracts

Whatever may have been said as to whether the law enters into existing contracts when such contracts are made in one state to be performed in another, or made between citizens of different states, it is unnecesary in the case at

bar to examine. The subject is much simpler when we confine it to the facts here presented. In the first place, these parties are both citizens of the same state; (see §4 chap 373, act of March 3, 1887, and Manufacturers' Nat. Bank, v. Baack, 8 Blatchf., 137,) the contract is made in the state; and is to be performed in the state. Under these circumstances no principle of law is more firmly settled and there is none upon which suitors may more confidently rely than this proposition :

> "*The municipal law of any state is a part of every contract made in that state and to be performed therein.*"
>
> Parsons on Contracts, 8th Edition, Vol. 3, at page 392 (Star page 439.)

Disregarding, as in fairness we ought to do, the learned opinion of Mr. Justice Washington in the case before alluded to, of Ogden v. Saunders, in which he distinctly says : "The law forms in my humble opinion a part of the contract and travels with it wherever the parties to it may be found, and is so regarded by all the civilized nations of the world," for the same reason which leads us to disregard the contrary doctrine enunciated by Mr. Chief Justice Marshall in the same case, viz: that each is dicta, although insisting that the dicta of Mr. Justice Washington has since become, nay, even then was the law of the land, we call the attention of the Court to Van Hoffman v The City of Quincy, 4 Wall., 533,

decided in 1866, where upon page 550, this Court unanimously said :

> "*It is also settled* that the laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

This principle could not have been more clearly stated nor in more definite and precise language. It was not the individual opinion of Mr. Justice Swayne, it was the opinion of the Court. It was announced nearly forty years after the case of Ogden v. Saunders, was decided, and it has never been questioned until now. It was repeated in 1871 by this Court, then as before unanimous so far as this proposition was concerned, in the case of White v. Hart, 13 Wall., 646 at page 653, and again in 1872 by a unanimous Court in case of Walker v. Whitehead, 16 Wall., 314, where at page 317 this language is found :

> "These propositions may be considered consequent *axioms* in our jurisprudence; the laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement."

And in 1877 by an unanimous court in the case of Edwards v. Kearzey, 96 U. S. 595, it was said on page 601:

> "It is also the *settled doctrine* of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement."
>
> Citing the Van Hoffman case and that of McCracken v. Hayward, 2 How., 508.

Where the Supreme Court of the United States has enunciated over and over again this proposition of law in the same language, and has called it *an axiom* and *a settled doctrine* of the court, and where this language has been used not as the opinion of one of the members of the court but as the unanimous opinion of the entire bench, it is difficult to believe that Mr. Paige is serious in arguing that such is not the law. If it is at all necessary we might add many other enunciations of this doctrine by this court, as for example, the case of Denny v. Bennett, 128 U. S., 489, decided by this court in 1888, where Mr. Justice Miller, delivering the opinion of the court used these words, on page 498:

> "The creditor who became such after the statute was passed cannot complain that the obligation of his contract is impared, *because the law was a part of the contract at the time he made it.*"

This latter opinion of Mr. Justice Miller is referred to with approval by Mr Justice Gray as

late as 1891, in the case of Brown v. Smart, 145 U. S., 454. This doctrine is now held by the Court of Appeals of the State of New York, emphatically in the case at bar, and the opinion of Judge Gardiner cited by Mr. Paige in the case of Donnelly v. Corbett, if not deemed dicta, as it was referred to in the case of Olyphant v. Atwood, 4 Bosw., 459, must be considered as overruled by the decision in the principal case.

Here is another New York Case:

> "The presumption of law is that a contract is made with reference to the laws of the country where made, *which form a part* of the contract."
>
> Sherill v. Hopkins, 1 Cow., 103 at p 108. Opinion by Sutherland, J.

"The laws of a state existing at the time of the making of a contract, enter into it as a part thereof, so far as regards its force and obligation."

Rorer on Interstate law, page 78.

Mr. Chief Justice Taney was evidently of this opinion when he said:

> "In other words, the existing laws of Illinois, *created* and defined the legal and equitable obligations of the mortgage contract."
>
> Bronson v. Kinzie, 1 How., 311 at p. 314.

Sixth.—If then the law of the State of New York as declared by its highest court, entered into this contract and formed a part of it, and the same court has held that it did and its construction will not be lightly questioned by this tribunal, the contract was complete. The assent of the National Bank was given when it received the deposit. Whatever difficulties may be in the way of implying such assent and such contract when the statute under consideration is a general statute, a sharp distinction can be drawn and no doubt can exist when the statute under consideration is a special statute like the one in question. The Savings Bank was a corporation of limited power. It had no right whatever to make the deposit in question, *except under the operation of this very statue which permitted the deposit* upon the terms we have stated. The National Bank on the contrary was perfectly free to receive or refuse this deposit upon such terms. Knowing, as it must be presumed to have known, the limitations under which the Savings Bank could deposit, knowing as it was presumed to know, the law as it is declared by the Court of Appeals to have been, its assent to the terms of this condition was impliedly given, and the contract was thus absolutely made at the moment the deposit was received. The equitable assignment was then given for a present consideration, and the law of the State of New York is shown to be a law which simply requires and makes a contract which it was within the proper sphere of state legislation to require and make, and which does not in any way conflict with any provision of the national bank act.

Seventh —The citations of Mr. Paige to those authorities which hold that the remedy may be changed provided as good a remedy is there after furnished, are in support of the defendant's contention, rather than that of the plaintiff, because if the law be not a part of the contract then the remedy could be changed even though as good a remedy were not substituted; but it is because the law is a part of the contract that the remedy cannot be changed unless as good a remedy be substituted and thereby the property right in the contract as given by the law, is saved.

In accordance with this same principle, it is held, that the marriage contract has read into it by implication the statute giving the widow dower, and thereby a vested right accrues which cannot be impaired by future legislation. In the case of Lawrence v. Miller, 2 Comstock, page 250, Shankland J., in writing for the Court says :

> "But there is another reason in my opinion for limiting the operation of the act in question to cases of marriage occuring after the 1st of January 1830, more potent than any of those above rendered, It is, that if the act should be construed to include the cases of dower, where the marriage and seizin of the husband occurred prior to the passage of the act, it would be void by the provisions of the 10th section of the first article of the Constitution of the United States. That section declares that no state shall pass any law imparing the obligation of contracts; and as the widow's right to dower

> is a right acquired by the marriage contract, and one of the benefits promised to her by *the law of the contract*, in consideration of her entering into that relation, it comes fairly within the letter and spirit of the prohibtory clause of the constitution, as a contract which cannot be impaired by subsequent legislation."

There are many other cases in which contracts are held to give rights which cannot be divested even by statutory enactment, when such rights are given not by the wording of the contract but by the statute law considered as part of the contract, but it seems hardly necessary to quote further on this branch of the subject.

EDWARD G. HERENDEEN,
Of Counsel.

January, 1896.

A. B. King, Printer, 89 William St., N. Y.

Office Supreme Court, U. S.
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Supreme Court of the United States.

No. 756.

CHARLES DAVIS,
Plaintiff in Error,

against

THE ELMIRA SAVINGS BANK.

In addition to the general brief of Mr. Herendeen, the defendant in error states the following propositions as being another form of arranging the general argument of that brief:

First.—Aside from any prohibition by law it was competent, at the times of the making of the deposits by the defendant, for a New York Savings Bank to make an *effectual* and *enforceable agreement* with a National Bank in that State, that, in case of the insolvency of the latter, deposits to be made by the former should be paid next after any claims preferred by the charter of the National Bank.

1. That such agreement would be *executory* and not *executed* would be no objection. The obligation of the former is not less sacred than that of the latter. That the tribunal for the enforcement of a right is a court of equity rather than a court of law does not matter.

2. Nor is it of any importance by *what name* the rights acquired by such an agreement may be most properly styled, whether by the term *equitable lien*, or *equitable assignment*, or mortgage.

3. All that is requisite is that the agreement should be valid as an agreement; and to this end all that is needed is a *sufficient consideration*, and a sufficient ascertainment of the *subject matter* of the lien or assignment. In the case before us no question will be made by anyone as to the sufficiency of the consideration; and none can be made as to the certainty of the subject matter. It is the body of the assets of the National Bank after insolvency and payment of the claims preferred by its charter. They are such assets as then remain in the hands of the Treasurer of the United States subject to the order of the Comptroller of the Currency.

4. Our proposition is that such an agreement is valid aside from express prohibition by

law. This must be true, for, aside from such prohibition, even an actual insolvent does not lose control of his property, or power of contracting. He may even pay or secure antecedent debts. and, *a fortiori*, make contracts upon full consideration which do not diminish the fund to which creditors may resort. (Am. & Eng. Enc., Vol. 11, p. 212.)

But, surely no question can be made as to the powers of a person or corporation fully solvent to make such a contract on full consideration.

Second.—The making of such agreement was not prohibited either by section 5236 or 5242 of the United States Revised Statutes.

1. The general direction of this statute to make "a ratable dividend" after payment of the circulating notes is not to be construed as a requirement to make equal dividends among all creditors.

Such an interpretation of this section would render it plainly unconstitutional. It is not in the power of the Congress of the United States to violently extinguish a lien, or other right resting in contract, by a mere statutory enactment.

The banks during solvency have full power of contracting, and may in numerous ways subject their assets to liens. The validity of such liens is to be determined, in the absence

of Federal legislation, by State law, and where they exist they must, of course, be recognized.

Scott *vs.* Armstrong, 146 U. S., 499.

2. Nor do the provisions of section 5242 forbid such an agreement.

The payments, transfers and preferences forbidden by this section are such as are designed to pay, secure or prefer an *antecedent* debt, to prefer which by lien or otherwise the bank is under no valid obligation existing at the time of insolvency, or of the contemplation of insolvency. The prohibitions of this section are not against contracts made upon consideration, but against transactions by way of payment or preference without consideration.

The lien or preference given was not given when the bank was insolvent, or in contemplation of insolvency, but when the bank was in full control of all its property.

Tiffany *vs.* Boatman's Inst., 18 Wall, 375, 388.

3. The case of Clark *vs.* Iselin, 21 Wall., 360, is very much in point, and apparently decisive. It was the plain intention of the confession of judgment under discussion in that case to give the creditor, in case of the insolvency of the debtor, a lien or preference upon the assets of the latter; but it was given when the debtor was *solvent*, and *advantage*

could be taken of it by the creditor without any further aid or assistance from the debtor.

So in the present case (assuming that the agreement is established) it was made when the bank was solvent, and no further act on the part of the debtor was needed to give it effect.

Third.—At thetime of the making of the deposits, the savings bank was entirely subject to the legislative power of the State. The National Bank was also subject to such legislative power, so far as the same could be exercised consistently with the legislation of the United States.

Fourth.—There was no legislation by the United States inconsistent with the provisions of Secs. 118 and 130 of the State Banking Law (Chap. 689 of Laws of 1892); and those sections were, consequently, valid enactments.

1. Any attempt by the Government of the United States to limit, after satisfaction of its claim for the redemption of the notes, the power of the banks over their assets, or the power of the State government over the action of the banks, would be, if valid, a most impolitic exercise of Federal power.

The statute should be so construed, if it be reasonably possible, as not to involve incon-

sistency with the State law. There is no difficulty in giving such an interpretation. The word "ratable" is the same as "*pro rata*," which means "according to the right proportion or allowance." A creditor of an insolvent estate is to be paid *pro rata* with creditors of the same class.

2 Bouvier's Law Dic., 466.

Fifth.—The making of deposits by a Savings Bank in a National Bank, and the acceptance of the same by the latter while such legislation was in force, constituted a valid and enforceable contract on the part of the National Bank giving to the Savings Bank an equitable lien upon, or assignment of, its assets to secure the deposits.

1. The Savings Bank could not make, or offer, such a deposit except on condition that the lien should be given.

2. The National Bank could not lawfully receive it without giving such a lien.

3. It had the *power* to give it; and we must presume that the power was exercised.

Sixth.—If it did not constitute such a contract, the law nevertheless required that the assets of the National Bank should be disposed of according to the direction of the statute.

Inasmuch as the National Bank had the *power*, at its will, to make such a contract and to give such a preference, it was entirely competent for the legislature *to act upon that ability and will* and to require the assets to be disposed of as the bank itself might have agreed to dispose of them.

1. Laws are compulsory upon the conduct, otherwise voluntary, of those who are subject to them.

2. If, as has already been shown, the sections referred to of the U. S. R. S. did not prevent the National Banks from making, while solvent, agreements giving liens on their assets in case of insolvency, subordinate to other liens created by their charters, then the distribution of such assets was, to precisely the same extent, in case of insolvency, subject to State legislation, and that legislation within those limits is valid as such.

These views reconcile the otherwise conflicting provisions of State and National legislation and enable the just policies of both to be carried into effect.

JAMES C. CARTER,
Of Counsel for
Deft. in Error.

See 161 U.S. 275. affirmed but same case

JAN 8 1896
JAMES H. McKENNEY,

In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 415.

CHARLES DAVIS,

161-275 *Plaintiff in Error.*

vs.

THE ELMIRA SAVINGS BANK.

Brief for Metropolitan Savings Bank on Reargument.

AUG. S. HUTCHINS,
Of Counsel.

ALBERT B. KING & CO., 105 WILLIAM ST., N.Y.

Supreme Court of the United States.

CHARLES DAVIS,
Plaintiff in Error,

against

THE ELMIRA SAVINGS BANK.

Brief Filed in Behalf of the Metropolitan Savings Bank on Re-argument.

Statement.

The Metropolitan Savings Bank is a corporation existing by and under the Laws of the State of New York. The said Savings Bank was a depositor in and now is a creditor of a National Bank now in process of liquidation. The said Savings Bank claims a preference in the funds now in hands of the Receiver of such National Bank under the Laws of the State of New-York.

Point I.

The New York Statute, being Chapter 689, Laws of 1892, covered the case of deposits by Savings Banks made in National Banks as well as in State Banks.

Supreme Court of the United States.

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Point I.

The New York Statute, being Chapter 689, Laws of 1892, covered the case of deposits by Savings Banks made in National Banks as well as in State Banks.

Sections 118 and 130 of the Banking Laws of the State of New York, read together, show clearly that the Legislature so intended.

Section 118 reads as follows :

"There may be kept an available fund not exceeding ten per centum of the whole amount of deposits with such corporation on hand or deposit in any bank in this State organized under any law of this State or of the United States."

Section 130 provides:

"All the property of *any* bank or Trust Company which shall become insolvent shall, after providing for the payment of the circulating notes, if it have any, be applied by the trustees, assignees or Receiver thereof, in the first place to the payment in full of any sum or sums of money deposited therewith by any savings bank."

The wording of the statute seems very clear and explicit, and no reason has been given, or it would seem, can be given, in equity or good morals for excepting from this remedial provision such deposits in a National Bank. On the contrary, the natural intendment would seem to lead to such construction as would preserve entire the earnings of the thrifty poor of any community.

Again, the highest Court of the State having construed this act on this question, its determination will not be lightly disturbed.

Supervisors *vs.* Stanley, 105 U. S., 305,310, 312.

Central Land Co. *vs.* Laidley.

U. S. Supreme Ct. advance sheets, Dec. 2, 1895.

Point II.

These provisions of the States Statute are within the proper sphere of State legislation.

The rule governing the point in question was clearly and distinctly laid down by this Court in the case of Waite *vs.* Dowley, 94 U. S., 527, 533. At the latter page Mr. Justice Miller, delivering the opinion of the Court, says: "We have more than once held in this Court that the National Banks organized under the Acts of Congress are subject to State legislation, except where such legislation is in conflict with some Act of Congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purposes of their creation." See also National Bank *vs.* Commonwealth, 9 Wall, 353; Tel. Co. *vs.* Mass., 125 U. S., 550-1.

In the latter case the Court says; "They (National Banks) are subject to the laws of the state and are governed in their daily course of business far more by the laws of the State than of the Nation. *All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts and their liability to be sued for debts are all based on State laws. It is only when the State law incapacitates the banks from discharging their duties to the Government that it becomes unconstitutional.*"

It has not been claimed by those who attack the constitutionality of this State statute that in its operation it will be found to embarrass or impede, much less destroy, the efficiency of the National Bank as a federal agency, or even in its ordinary every day duty as a depository of money. The law simply places the State and National Bank on the same footing in this respect.

Point III.

The effect of the acts of the parties as controlled and governed by the State statute was to create in the Savings Bank a vested although inchoate right which upon the failure of the National Bank became fixed and certain, and which covered all the funds which came into the hands of the Receiver.

The claim or right which arose upon the deposit by the Savings Bank with the National Bank seems in many respects analogous to the dower right which arises in the State of New York upon a marriage where the husband at the time of such marriage is or subsequently, during the coverture of the wife, becomes seized of real property.

The right of dower as it exists to-day under the provisions of the Revised Statutes of the State of New York has been held to be a subsisting legal, although inchoate right, which becomes fixed and certain as to any particular parcel of real estate only upon the death of the husband during the lifetime of the wife. It is, however, held to be a present existing right which attaches generally to all present or after-acquired real estate. In the late case in the Court of Appeals of the State of New York of Clifford *vs.* Kamfe (reported in New York State Reports and Session Laws No. 134, p. 384), the facts were as follows: The plaintiff was seized of an inchoate right of dower in certain premises. Her husband James Clifford, as owner of record made and delivered to defendants a deed conveying to them such property and in which deed the plaintiff appeared to have joined.

The action was brought by the wife to set aside and cancel said deed so far as her interest was concerned on the ground that her alleged signature was a forgery. The question came up before the Court on a demurrer. The Court per Haight, J., writing the opinion, in

which all concurred, says: "Dower accrues to the widow and not to the wife and until she becomes a widow her right is inchoate and contingent. Her claim can only become effective on the death of her husband and her survival. Being inchoate and contingent her interest does not amount to an estate or title, and yet she has an interest which attaches to the land as soon as there is a concurrence of marriage and seizin.

The right of a doweress is not only a legal right and so adjudged at law but a moral right to be provided for * * * * The inchoate right of dower is a valuable, subsisting, separate and distinct interest which is entitled to protection and for which the wife may sustain a separate action."

In Lawrence *vs.* Miller, 2 Comst. (2d N. Y. Rep.), 250 Shankland, J., writing the opinion of the Court, says: "The right of dower attaches at the instant of marriage, and cannot be defeated by the alienation of the husband alone. (1 Cruise's Dig., 136.) In the case of Kelly *vs.* Harrison (2 John Cas., 29), the principle was established, that by the marriage and seizin of the husband, the wife's right of dower became a vested right, and could not be impaired by the subsequent acts of the government and of course not by subsequent legislation." * * *

"The 16th Section of our Statutes concerning dower (1 R. S., 442) places the wife's claim on the same basis as that of jointure. She cannot be barred or prejudiced by any act in the one case which would not prejudice the other. A jointress is considered a purchaser, marriage alone being considered a valuable consideration."

We seem in the case at bar to have a very analogous right, and one that has now become a subsisting, fixed and definite right of title as to such funds as may have come

into the hands of the Receiver upon the failure of the National Bank.

The effect of the contract created between the parties, by the deposit by the Savings Bank in the National Bank as governed and controlled by the statute, was that all the assets of the National Bank became immediately subject to this right or claim of preference which, however, covered them generally and not specifically, and was liable to be defeated as to any specific deposit by its transfer at any time previous to the failure of the bank and became fixed and certain as to any such specific deposit only upon that event. It was, however, during all the time a subsisting legal right existing in favor of the Savings Bank, and by reason of its existence an equitable lien attached to all the deposits and other property of the National Bank. Every depositor depositing in the National Bank did so with the notice that his deposit was covered by and subject to this right or claim of preference in the same manner as one buying land from a married man takes it subject to the dower right on the part of the wife.

As is said by Gray, J., writing the opinion below (142 N. Y., page 597): "In the present case while a going concern, it (the National Bank) entered into an engagement with the Savings Bank which the State law required and regulated; which vested in the latter superior rights or equities and which in the possible event of future insolvency would give to it a prior claim to payment from the assets. When that event happened and the Receiver was appointed he took over the property of the insolvent concern as trustee for its creditors and shareholders under the same conditions as the bank held it and subject to the right of the plaintiff to be first paid in full."

Point IV.

The highest Court of the State having declared the effect of the acts of the parties as governed and controlled by the State Statute, this Court will adopt such decision in its examination of the questions herein involved.

Central Land Co. *vs.* Laidley (*supra*).
Louisiana *vs.* Pillsbury, 105 U. S., 278-94.
Morley *vs.* L. S. & M. S. R. R. Co., 146 U. S., 162-66.

In Louisiana *vs.* Pillsbury we find the following: "Whether such a construction was a sound one is not an open question. The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under it are concerned and constitutes part of the law as much as if embodied in it."

Point V.

The Statute in question is not in conflict with the provisions of the Federal Statute.

If we have established the propositions that the State Statute covered the deposits in question, that such statute is within the proper sphere of State legislation, and by reason of such statute governing the acts of the parties a pre-existing right or claim became fixed and vested in favor of plaintiff at the time of the failure of the bank, but one question remains to be considered.

That question is as follows: Do the provisions of the Federal Statute prohibit all preferences, even preferences the result of a pre-existing clain. or right in favor of one or more classes of depositors? The contention of the Receiver

is that the Federal Statute plainly and unmistakably enacts that under no circumstances shall any creditor of a defunct National Bank receive a greater payment than another from the assets of the failed bank.

Such contention seems to be in direct conflict with the decision of this Court in Scott *vs.* Armstrong, 146 U. S., pages 499, 510. Mr. Justice Fuller, delivering the opinion of the Court, says, at the latter page: "Undoubtedly any disposition by any National Bank, being insolvent or in contemplation of insolvency, of its choses in action securities or other assets, made to prevent their application to the payment of its circulating notes or to prefer one creditor to another is forbidden, *but liens, equities or rights arising by express agreement or implied from the nature of the dealing between the parties or by operation of the law prior to the insolvency, and not in contemplation thereof, are not invalidated.* The provisions of the act are not directed against all liens, securities, pledges or equities whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency."

In the case at bar we have one of the exceptions so clearly pointed out in Scott *vs.* rmstrong. We have a right or equity implied from the nature of the dealings between the parties, as governed and controlled by the State Statute and arising prior to the insolvency, and not in contemplation thereof.

Point VII.

To uphold the validity of the State Statute could in no manner affect injuriously the future operations of National

Banks. On the contrary, it would be of great benefit to them, as not only confirming them in the holding of their present Savings Banks' deposits, but as an inducement to, and justification of, the increase of such deposits. *A contrary decision must inevitably lead to the withdrawal of such deposits as they now have.*

The decision sought for by the Saving Banks in this action is one that will prove more beneficial to the National Banks than to the Saving Banks.

It is doubtless of great value to the latter that their choice of depositories be made as large as possible, but it is still more important to the National Banks that the vast sums held by the Saving Banks should be allowed to seek them as depositories. If the decision of this Court be an affirmance of the decision below, a very large increase in such deposits will immediately follow. A contrary decision must inevitably lead to the National Banks losing even such deposits as they may now have.

No Board of Trustees of any Savings Bank would feel justified in placing or keeping the money under its control in a National Bank under such circumstances. Indeed the counsel for the Receiver in his argument before this Court admitted as much in answer to a question by the Court.

It has been repeatedly held by this Court that the only State Legislation regarding National Banks which will be held invalid by this Court in such Legislation as will retard, impede or restrict their operations or incapacitate them from discharging their duties as Federal instrumentalities.

Tel. Co. *vs.* Mass. (*supra*).
Waite *vs.* Dowley (*supra*).

The decision we here contend for is one that will aid the National Banks so long as they remain going concerns and, therefore, so long as the Federal Government is interested in their operations.

It does not seem that a claim or right which although existent is operative only after the bank has ceased to have any active existence can result in any interference with, or embarassment to, its operations or in any manner restrict its efficiency as a Federal instrumentality, while on the other hand its denial by this tribunal must concededly restrict the sphere of usefulness and emolument of the National Banks.

AUG. S. HUTCHINS,
Of Counsel for Metropolitan Savings Bank.

ADDENDUM.

Reply to Argument of Plaintiff in Error.

The attempted statement of our position contained in our opponent's first point is a misstatement.

Our contention is not "that the act of depositing the moneys * * * effected a contract which imported into its terms the terms the Laws of New York."

Our contention is that the acts of the parties as controlled and goverened by the law and made as it was while the law was in existence and in contemplation thereof resulted in an immediate contract, which contract of necessity carried with it an equitable lien generally upon all funds then in the bank, or that might thereafter be placed in the bank. The question is not as stated by the learned counsel, can the law stand against the Federal Statute? Of course it cannot. The question is this: Are preferences, the result of contracts made when the bank was solvent and a going concern, within the purview of the Federal Statute? The brief for the Receiver presents two alternatives.

First.—If the law of New York can stand *against* the Federal Statute.

Second.—If the law of New York cannot stand *against* the Federal Statute.

But why does the brief not contain the third alternative, as follows:

Third.—If the laws of the State of New York can stand *with* the Federal Statute.

The respondents refuse to accept the alternative so ingeniously presented to them. Our contention is that the two Statutes can and do stand together.

The attempt in all such cases will be if possible to reconcile and give effect to the provisions of both Statutes. The Receiver's brief appears to confuse the effect of the two Statutes. The Federal Statutes, so far as the question involved is concerned, is undoubtedly a Statute of distribution, but as held in Scott *vs.* Armstrong, it does not affect rights or equities which are in existence at the time the National Bank closes its doors. If the National Bank choose to avail itself of the privilege of receiving the Saving's Bank deposit, it does so on the condition known to all men, that such deposit shall be preferred in case of failure, and if such deposit is made while the bank is solvent and a going concern, a present right arises, which is as complete a contract at the moment of deposit as it is after the bank's failure. It is only inchoate in the sense that a dower right is inchoate. The State Statute, so far as the question involved is concerned, was no more a Statute of distribution than are the Statutes concerning dower. The Statute of dower and the State Statute in question contemplate the creation of immediate rights, to be postponed in enjoyment until the happening of a certain event; the one event being the death of the husband, the other being the death of the National Bank. In the one event the Receiver, in the other the heirs or legal representatives, take the estate, subject to the pre-existing right.

If the contention of the Receiver in the Second Point of his brief be correct, then the Statute of Dower in the State of New York is nothing but a Statute of distributions, and by the marriage of the parties interested on right arises. This we have shown to be quite contrary to all authority on the subject.

We find no such contention in the brief, nor do we believe that any such contention will seriously be made and

yet that right is in all things analogous to the right in question that is to say one arising from the acts of the parties as governed and controlled by and in contemplation of the State Statute. The right does not depend altogether upon the Statute nor altogether upon the acts of the parties, but primarily upon the acts of the parties entered into presumably in view of the existence of the Statute.

The learned counsel lays much emphasis upon the argument that if the Savings Bank had a contract that it should be paid in full that then also all the other depositors had a contract that the Savings Bank should not be paid in full. This simply begs the question as to the effect of the Federal Statute. If it be true, how was it that the depositor in Scott *vs.* Armstrong, got his money in full. Is it not because the Federal Statute was there construed to be aimed not at all preferences, but at preferances the results of arrangements attempted to be entered into, while the National Bank was contemplating failure, and not at preferences the result of rights acquired while the bank was a going concern.

The whole question in a word seems simply this:

At what preferences was the Federal Statute aimed? This is the only and real question, and this question is studiously avoided in the brief for the Receiver. The decision in Scott *vs.* Armstrong has established the law for all times, to this effect, that the Federal Statute was not aimed at preferences the result of rights or equities existing at the time of the bank's failure.

Such a right or equity existed in this case, and a preference the result of such right or equity we here contend for. No learning or ingenuity can confuse this plain proposition.

161 US 291

TRANSCRIPT OF RECORD.

161-291

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 413.

ALVIN C. LEIGHTON, APPELLANT,

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 16, 1894.

(15,637.)

(15,637.)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 11, 1895.

1 In the Court of Claims.

ALVIN C. LEIGHTON *vs.* THE UNITED STATES & THE SIOUX TRIBE, THE Ogallalla, Brule, Sans Arc, Minneconjou, Two Kettle, Unepapa, Yanktonnais, and Yankton Bands of Sioux, The Northern Cheyenne and Arapahoe, and The Cheyenne and Arapahoe Tribes of Indians.	No. 820. Indian Depredation.

I.—*Amended Petition.*

(Filed March 3, 1894, in lieu of original petition, filed April 18, 1894.)

To the honorable the Court of Claims:

The claimant, Alvin C. Leighton, respectfully represents:

I. That he is a resident of Ottumwa, Wapello county, Iowa, and a citizen of the United States.

II. That the following property belonging to claimant, who was at that date a citizen of the United States, was taken by
2 Indians of a tribe or nation then in amity with the United States, the date, place, and tribe being particularly stated below:

While en route between Fort Fetterman, Wyoming, and Fort Reno, Dakota, on or about the 10th day of April, 1867, by Indians as aforesaid.

16 mules at $225.00	$4,080 00
5 horses at $185.00	925 00
Total	$5,005 00

That said Indians are chargeable with said depredation by reason of a treaty between the said Indians and the United States.

III. That a claim for said property, with evidence therein, was presented to the Commissioner of Indian Affairs, the items of said claim being as heretofore stated.

That the following action was taken thereon: December 5, 1873, allowed for $3,025.00 and reported to Congress March 27, 1874. Subsequently, on November 29, 1887, allowed for $2,500 and reported to Congress (Ex. Doc. 34, 50th Congress, 1st session).
3 IV. That no other action than as aforesaid has been had on this claim in Congress or by any of the departments; that the claimant is the sole owner of this claim and the only person interested therein, and no assignment or transfer of this claim or of any part thereof or interest therein has been made; that the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; that the claimant is a citizen of the United States; and the claimant believes the facts as stated in this petition to be true.

1 In the Court of Claims.

ALVIN C. LEIGHTON *vs.* THE UNITED STATES & THE SIOUX TRIBE, THE Ogallalla, Brule, Sans Arc, Minneconjou, Two Kettle, Uncpapa, Yanktonnais, and Yankton Bands of Sioux, The Northern Cheyenne and Arapahoe, and The Cheyenne and Arapahoe Tribes of Indians.	No. 820. Indian Depredation.

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And the claimant prays judgment upon the facts and the law in the sum of five thousand and five dollars.

SANBORN & KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

Charles King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case; I have read above
4 petition, and the matters therein stated are true to the best of my knowledge and belief.

CHARLES KING.

Subscribed and sworn to before me this 3rd day of March, 1894.

GEO. E. TERRY,
[SEAL.] *Notary Public, D. C.*

II.—*Traverse.*

(Filed May 27, 1891.)

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

JOHN B. COTTON,
Assistant Attorney General.

III.—*Claimant's Election to Reopen.*

(Filed January 7, 1893.)

Now comes the claimant, Alvin C. Leighton, and elects to reopen the claim set forth in the petition in this cause and try the same before the court.

And he avers that the allowance made in said claim was
5 erroneous in this respect, that the Commissioner of Indian Affairs and the Secretary made an allowance of $2,500 by fixing the value of the mules, on account of which claim is made in said petition, at $125 and of the horses at $100 each, whereas the allowance should have been for $5,005, the value of the mules being $255 each and of the horses $185 each.

And the claimant refers to the evidence taken under the rules of this court as well as that presented to the Interior Department in support of this allegation of error.

The claimant does not seek to disturb the findings or award of the Commissioner of Indian Affairs and Secretary of the Interior in any other respect than as above set forth, but admits that the same are correct in all other respects.

ALVIN C. LEIGHTON, *Claimant.*
SANBORN & KING,
Attorneys for Claimant.

STATE OF IOWA, }
County of Wapello, } ss:

6 On this 30th day of Dec., 1892, personally appeared before me Alvin C. Leighton, to me personally known to be the person who executed the foregoing instrument, and acknowledged the same to be his act and deed, and made oath that the facts therein set forth are true to the best of his knowledge and belief.

BEN. S. BENSON,
[SEAL.] *Notary Public.*

IV.—*Findings of Fact and Conclusions of Law.*

(Filed May 28, 1894.)

This case having been heard before the Court of Claims, the court upon the evidence makes the following findings of fact:

I.

The claimant, Alvin C. Leighton, was at the date of the depredation hereinafter mentioned and ever since has been and now is a citizen of the United States, now residing in Ottumwa, in the State of Iowa.

II.

7 On the 10th day of April, 1867, and long prior thereto the claimant was a post trader or sutler at Fort C. F. Smith and Fort Reno and owned and possessed personal property consisting of sixteen mules and five horses.

III.

On said day, while en route from Fort Fetterman to Fort Reno, Indians belonging to the Ogallalla band of the Sioux tribe stampeded the stock and took and drove away sixteen mules and five horses belonging to the claimant, without just cause or provocation on his part or that of his agent in charge of said stock at the time, and that no part of said stock has since been returned or paid for.

IV.

At the time of the loss of said property the Ogallalla band of the Sioux tribe of Indians was in separate treaty relations with the United States under treaty dated October 28, 1865, proclaimed March 17, 1866 (14 Stat. L., 747), and were receiving annuities thereunder. The said Ogallalla band of Sioux Indians, under its
8 principal chief, Red Cloud, was at the time of said depredation in armed hostility against the United States in resisting the military authorities in the opening of a military road and the establishment thereon of military posts and maintaining the same along what was known as the "Boazman road," extending from Fort Laramie, in Wyoming, to Fort Smith, in Montana. The rela-

tions of said band of Sioux Indians to the United States at that time will further appear from the following public documents, of which the court takes judicial notice, viz: Report of the Secretary of the Interior for 1866–1867 and 1867–1868, including the report of the peace commission therein at page 501; report of the Commissioner of Indian Affairs for 1865-1866 and 1866–1867; report of the Secretary of War for 1867–1868; Senate Executive Document No. 13, 40th Congress, 1st session; Senate Executive Document No. 33, 50th Congress, 1st session, and also History of Massacre of the Mountains, by J. P. Dunn, Jr., M. S., LL. B., pp. 477–509.

9 From these facts the court finds the ultimate fact, so far as it is a question of fact, that the Ogallalla band of the Sioux tribe of Indians was not in amity with the United States at the time of the depredation hereinbefore found.

At the request of the claimant, the court makes the following additional findings of fact:

V.

The reasonable value of the property taken, as hereinbefore set forth, was in excess of $3,000.

VI.

The claim was presented to the Commissioner of Indian Affairs March 8, 1873, and was allowed by that officer, in the sum of $3,025, December 5, 1873, and reported to Congress by the Secretary of the Interior March 27, 1874. The claim as thus allowed was also submitted to Congress in accordance with the provisions of the act March 3, 1885 (23 Stat. L., 376), 1 Sup'l't R. S., 2d ed., p. 913, note, by report dated January 20, 1886, as barred, because not filed within three years from the date of the alleged injury, as required

10 by section 17, act 1834 (4 Stat. L., 731), House Ex. Doc. No. 125, Forty-ninth Congress, first session. The claim was subsequently examined by the Secretary of the Interior or under his direction and allowed in the sum of $2,500, under the authority of the act of March 3, 1885 (*supra*), and subsequent Indian appropriation acts, and reported to Congress January 5, 1888, H. Ex. Doc. No. 34, Fiftieth Congress, first session. After the presentation of the claim to this court the claimant elected to reopen the case and try the same before the court, under section 4, act of 1891, March 3 (26 Stat. L., 851), 1 Sup'l't R. S., 2d ed., p. 913, and has taken and submitted to the court additional evidence as to the value of the property so taken and as to the disposition of the Indians at the time of the depredation.

VII.

In considering Indian depredation claims under the act of March 3, 1885, and subsequent Indian appropriation acts, the practice of the Interior Department was to examine claims under said

11 acts whenever there was a treaty with the tribe charged with the depredation containing provisions the same as or sub-

stantially similar to those contained in article 1 of the treaty with the Ogallalla band of Sioux Indians of October 28, 1865 (14 Stat. L., 747), and in article 1 of the treaty with the Sioux and other Indians of September 17, 1851 (Revision of Indian Treaties, p. 1048), and the Secretary of the Interior in his reports to Congress referred to such provisions as creating an obligation for payment.

No discrimination was made by the Secretary of the Interior in the examination and allowance of claims under said acts between claims where the tribe charged was in a state of peace with or engaged in actual hostilities against the United States. Under said acts the practice of the Interior Department was that where a treaty existed between the tribe charged with a depredation and the United States the amity of such tribe was not jurisdictional before the department; that whenever there was a treaty containing pro-
12 visions the same or substantially similar to those contained in the treaties referred to, there was a liability against such tribe, whether such tribe has agreed by treaty to pay such claim or not.

The Secretary of the Interior reported the allowance of a great number of such claims to Congress at each session thereof, with a recommendation for payment, and the same were printed and laid before Congress, but Congress refused to make appropriations to pay such allowed claims. Congress had theretofore refused to pay depredation claims where the tribe charged was at war with the United States, on the ground that such losses were incident to a state of war with a savage tribe. (House reports No. 932 and No. 1028, Twenty-fifth Congress, second session.)

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the defendant, The Ogallalla Band of the Sioux Tribe of Indians, was not in amity with the United States at the time of the depredation complained of, and the petition is dismissed.

13 V.—*Judgment of the Court.*

ALVIN C. LEIGHTON
vs.
THE UNITED STATES *et al.* } No. 820. Indian.

At a Court of Claims held in the city of Washington on the 28th day of May, 1894, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the claimant's petition be dismissed.

VI.—*Application of Claimant for and Allowance of Appeal.*

ALVIN C. LEIGHTON
v.
THE UNITED STATES *et al.* } No. 820. Indian.

At a Court of Claims held in the city of Washington on the 21st day of June, 1894, the following proceedings were had:

Sanborn & King, for the claimant, filed an application for the allowance of an appeal, and it was ordered that the appeal be allowed as prayed for.

14 In the Court of Claims.

ALVIN C. LEIGHTON
vs.
THE UNITED STATES *et al.* } No. 820. Indian.

I, Archibald Hopkins, clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusions of law thereon, of the judgment of the court, and of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 13th day of July, 1894.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Ch. Clerk Court of Claims.

Endorsed on cover: Case No. 15,637. Court of Claims. Term No., 413. Alvin C. Leighton, appellant, *vs.* The United States *et al.* Filed July 16, 1894.

Office Supreme Court, U. S.
FILED.
OCT 12 1895
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 413.

ALVIN C. LEIGHTON, Appellant,

vs.

THE UNITED STATES, et al.

Appeal from the Court of Claims.

Appellant's Statement of Case, Assignment of Error and Argument.

CHARLES KING,
WILLIAM B. KING,
Attorneys for Appellant.

H. L. McQUEEN, PRINTER.

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Supreme Court of the United States.

October Term, 1895.

ALVIN C. LEIGHTON, appellant,
v.
THE UNITED STATES, and the OGALLALLA SIOUX and other tribes of Indians. } No. 413.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from the Court of Claims from a judgment for the defendants in a suit against the United States and the Ogallalla Sioux and other Indians under the act of March 3, 1891, "to provide for the adjudication and payment of claims arising from Indian depredation" (1 Supp. R. S., 913; 26 Stat. L., 851; *post*, p. 77).

The depredation complained of was committed on April 10, 1867, by Ogallalla Sioux Indians. They were then in treaty relations with the United States under the treaty of October 28, 1865 (14 Stat. L., 747, *post*, p. 104). It is found by the Court of Claims (Finding VI, Record, p. 4) that the claim was presented to the Commissioner of Indian Affairs, March 8, 1873; was allowed by him, December 5, 1873; was re-examined under the act of March 3, 1885, (1 Supp. R. S., 913, *post*, p. 76), and its amendments, and allowed by the Secretary of the Interior. It was presented to the Court of Claims under the act of March 3, 1891

(1 Supp. R. S., 913) and the claimant elected to reopen the case (Record, p. 2) under Sec. 4 of that act (1 Supp. R. S., 915, *post*, p. 80).

The judgment of the Court below (in form on the merits of the case) was actually on the ground that it was without jurisdiction because at the time of the depredation by the defendant Indians, they were not in amity with the United States, the court saying "amity is a test of jurisdiction in all cases" (Leighton *v.* United States, 29 C. Cls., 317) The opinion of the Court of Claims here cited, which governs this case, having been rendered in another case, although of the same claimant, does not appear in this record.

ASSIGNMENT OF ERROR.

For cause of error, the appellant says that the court erred in dismissing the claimant's petition for want of amity because:

1. The jurisdiction of the Court of Claims extends to other cases besides those in which amity exists.

2. Amity existed at the time of this depredation.

The claimant contends that the act of March 3, 1891, gives jurisdiction to the Court of Claims over an Indian depredation claim, possessing any one of three qualifications: amity, executive approval, or treaty obligation. He asserts in opposition to the opinion of the court:

1. That the existence, in this case, of a state of amity on the part of the Indians is immaterial,

(*a*) because the claim had, prior to March 3, 1891, been allowed by the Secretary of the Interior, such allowance under the statute concluding the court upon the question of amity,

(*b*) because the Indians committing the depredation were under a treaty obligation to pay for it.

2. That when the depredation was committed, the Indians were in amity.

ABSTRACT OF ARGUMENT.

The jurisdiction granted by this act is conferred by its first section, as follows:

"That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

"First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

"Second, Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject however to the limitations hereinafter provided.

"Third. All just offsets and counter claims to any claim of either of the preceding classes which may be before such court for determination."

This argument will attempt to show:

I. That before March 3, 1891, separate classes of Indian depredation claims existed, those arising in amity and not in amity, both demanding final settlement (*post*, p. 4).

II. That Congress intended by the act of March 3, 1891, to provide for other claims beside those arising in amity, as shown by (*a*) the structure of section 1 of the act and (*b*) the legislative history of its passage (*post*, *p.* 14).

III. That this claim belongs to both of the two classes

embraced in paragraph "Second" of Section 1, because it was (*a*) an allowed claim on March 3, 1891, and (*b*) the Indians were under a treaty obligation to answer for their depredations (*post*, p. 21).

IV. That when jurisdiction is acquired under Section 1, the duty of the court is to determine the merits of the claim and render judgment, according to the terms of Section 5 (*post*, p. 53).

V. That the condition of amity actually existed so as to bring this case also within paragraph "First," because (*a*) the Indians were not at war when the depredation was committed and (*b*) they were in treaty relations (*post*, p. 55).

ARGUMENT.

I. SEPARATE CLASSES OF INDIAN DEPREDATION CLAIMS PRIOR TO 1891.

(a) Originating under both Statute and Treaty.

Indian depredation claims have been a subject of Federal legislation and treaty since before the Constitution. To reach an intelligent basis for a construction of the act of March 3, 1891, the culminating law on this subject, an examination of all preceding laws and treaties is necessary. All these statutes and summaries of treaty provisions are annexed to this brief as Appendices A and B (*post*, pp. 69, 84).

CLAIMS UNDER STATUTES.

The first act is that of May 19, 1796 (1 Stat. L., 472; *post*, p. 69). This provides that if a depredation is committed by Indians of a tribe in amity with the United States upon the property of citizens or inhabitants of the United States, application for satisfaction may be made to the Indian tribe; if refused the United States guarantees indemnity

to the injured party and the President may deduct the amount paid to the sufferer from the Indian annuities.

This act, with some modifications not of importance to the present case, was re-enacted in 1799 (1 Stat. L., 747), in 1802 (2 Stat. L., 143) and in 1834 (4 Stat. L., 731) (see Appendix A, pp. 70–72). By the act of February 28, 1859 (11 Stat. L., 401; Appendix A, p. 73) the promise of ultimate indemnity was repealed; by that of July 15, 1870 (16 Stat. L., 360; Appendix A, p. 74), no Indian depredation claims were to be paid without special appropriation by Congress. The provisions of the act of 1834 as amended by that of 1859, were carried into the Revised Statutes as Sec. 2156, and those of the act of 1870 as Sec. 2098.

Prior to the acts of 1859 and 1870, it had been the practice to pay such claims as they arose and were established. An interesting reference to this practice occurs in a communication of the Hon. William H. Crawford, Secretary of War, to Congress of March 13, 1816, as follows (Am. State Papers, Indian Affairs, Vol. II, p. 27):

"The accounts of the agents of the Government for the several tribes in amity with us are still returned, and settled in the War Department. From the payment of annuities to the various Indian tribes within the United States, a new species of jurisprudence has sprung up, which operates as a heavy tax upon the time of the Secretary of War."

"All losses of property by American citizens, from the robberies, thefts, and depredations of those tribes, are to be remunerated out of the annuities payable to them. The evidence in all these cases is extra-judicial, and requires the examination and approbation of the Secretary before remuneration can be made."

After the acts of 1859 and 1870, the examination of such claims continued but payments were restricted as provided by them.

It is thus seen that the losses by Indian depredations for which indemnity was provided by statute were losses occurring at the hands of tribes "in amity" with the United States.

CLAIMS UNDER TREATIES.

Concurrently with the statutes, a series of treaties were made by which the Indians assumed obligations of varying character in regard to depredations or tribal outbreaks. A summary of Indian treaties appears as Appendix B of this brief (*post*, p. 84), containing the text of the obligations assumed. Some of these treaties contain general promises to pay for depredations; others agree to pay for depredations commited by bad men of the tribe, in some cases requiring a certain mode of procedure to charge the tribe; others contain general obligations from which the tribal liability for depredations is a proper subject of inference.

In almost all the treaties two provisions appear, varied in language but the same in obligation. These are (1) a declaration that the tribe is bound by the laws of the United States and (2) a covenant to refrain from hostility.

The very early treaties with the Cherokees of November 28, 1775 (7 Stat. L., 18), with the Choctaws of January 3, 1786 (7 Stat. L., 21), and with the Chickasaws of January 10, 1786 (7 Stat. L., 24), all alike (Appendix B, *post*, pp. 84, 85) acknowledge that the Indians are under the protection of the United States, agree that Congress shall have the exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper, and provide that the hatchet shall be forever buried, and that peace and friendship shall be universal.

Similar provisions are made in treaties with almost all

the Indian tribes (see Appendix B, p. 84), from this early period until the act of March 3, 1871 (16 Stat. L., 566; R. S., Sec. 2079), forbidding further Indian treaties. In the treaty with the Ogallalla Sioux of October 28, 1865 (14 Stat. L., 747), which governs this case, and in the whole series of treaties negotiated about the same time (*post*, p. 104) the Indians "acknowledge themselves to be subject to the exclusive jurisdiction and authority of the United States," and bind themselves, individually and collectively, "to cease all hostilities against the persons and property of the citizens."

See Appendix B for other treaties.

The declaration of subjection to the laws of the United States includes subjection to the intercourse laws of 1796, 1799, 1802, 1834, and to Sec. 2156 of the Revised Statutes of 1874, which, we have already seen, require payment for depredations committed in amity. To that extent the claims arising under treaty are the same as those under statute, since the treaty merely recognizes the statute.

But the treaty obligation is broader. The paramount authority of the United States being recognized, a duty of peaceful obedience, generally declared by express covenant, must at once be admitted. Hostility by the Indians is therefore a breach not only of their implied obligation to the sovereignty but also of their express contract of peace. From this an obligation is inferable to respond to the United States for property wrongs inflicted on its citizens in time of tribal outbreak. To what extent this obligation has been recognized by the United States will be seen hereafter and upon what principles it rests. It is not the purpose at this place to show the validity of this obligation; that will be done hereafter (*post*, p. 40). The present object is to call attention to the fact that claims for war losses, based on this obligation, were continually presented, as well as claims for depredations by individuals in time of tribal peace.

EXECUTIVE PRACTICE.

The finding (no. VII) of the Court of Claims (Record, p. 4), that war claims were considered and decided by the Secretary of the Interior, establishes that such claims were presented and required settlement.

In the comprehensive report of Indian depredation claims filed in the Interior Department (H. R. Ex. Doc. 125, 49th Cong., 1st Sess.) occur many arising during flagrant hostilities, filed at a very early date. Appendix C (*post*, p. 108) contains references to such claims arising in the Oregon and Washington hostilities of 1855–1856, filed in the Interior Department. It has been found by the Court of Claims in a case now before this court (Valk *v.* United States, 28 C. Cls., 242) that these Indians were in armed hostility and war. Similar lists could easily be compiled of early presented claims arising during other like disturbances.

In the opinion of Judges Nott and Davis in Love *v.* United States, 29 C. Cls., 332, 338, it is said:

"If we estimate their number by the character of the cases which have come before the court, the result will be that about half of the Indian claims pending in Congress when the act was passed were either for property destroyed in war or those of aliens."

LEGISLATIVE PRACTICE.

The practice of Congress in regard to paying Indian depredation claims arising in a state of war has not been uniform.

In Finding VII in this case (Record, p. 4), the Court of Claims refer to Congressional reports made in 1838 and 1851 refusing to appropriate money for losses at the hands of the Seminole and Creek Indians during the hostilities of 1835 and 1836.

No declaratory action by Congress appears approving

that report, but Congress subsequently appropriated, by the act of March 3, 1841 (6 Stat. L., 822), $9,779 to pay Avery, Saltmarsh & Co., mail contractors for property captured and destroyed by the Creek Indians in May, 1836, and by act of June 10, 1872 (17 Stat. L., 690), $30,000 to pay the heirs of Alexander Watson for property "lost, captured, or destroyed in Florida during the Indian hostilities commencing in 1835." The rule laid down by the Committee in the reports cited appears not to have been accepted as authoritative.

That no uniform rule was ever established refusing to pay for Indian depredations committed during hostilities is seen by other legislation. Depredations by the Sioux during the flagrant outbreak of 1862 (declared to be war by the Court of Claims in the case of Wright *v.* United States, no. 385, and Darling *v.* United States, no. 9,341) were paid for out of their confiscated annuities under authority of the act of February 16, 1863 (12 Stat. L., 652). See also other acts providing pay for depredations during this war (13 Stat. L., 92; 18 Stat. L., 543; 19 Stat. L., 549).

Other cases of payment for Indian war losses are cited in Appendix D, p. 115.

No general policy of the government can be concluded from these scattered precedents. They are a fair illustration of the vice of special legislation. Apparently no fixed policy was ever adopted, and no final rule of adjudication settled. Claims were made under these treaties for war losses; a few were paid, but, exactly as occurred with the great mass of claims arising under a state of amity, nearly all were left without action.

It is seen from this review that on July 15, 1870, when the last act cited was passed, there were two classes of Indian depredation claims pending and unsettled, those committed by tribes "in amity," governed by statute, and

those committed by tribes at war, the obligation for which was based upon the violation of treaty stipulation.

(b) These Classes Recognized in Acts of 1872 and 1885.

ACT OF 1872.

These two classes are recognized by Congress in the act of May 29, 1872 (17 Stat. L., 190; Appendix A, p. 174). This directed the Secretary of the Interior to publish rules for the presentation and proof of "claims arising under existing laws or treaty stipulations for compensation for depredations committed by the Indians." Claims arising "in amity" were made under "existing laws"; indemnity for Indian war losses was claimed under violated "treaty stipulations" to keep the peace. Such claims were to be reported to Congress, with his action, "whether allowed by him or not." Successive Secretaries acted upon a very large number of claims under this act and made numerous reports of their action to Congress. Appendix E contains a list of such reports (*post*, p. 115).

The allowances under this act included claims arising in war and presented under treaty stipulations. Those arising in the Oregon Indian war of 1855 and 1856 are set out in Appendix C, this showing numerous allowances by the Secretary of the Interior under the act of May 10, 1872 (R. S. 2156), for war losses (*post*, p. 108).

UNDER ACT OF 1885.

By act of March 3, 1885 (23 Stat. L., 376; 1 Supp. R. S., 913; Appendix A, p. 76), the Secretary of the Interior was directed to make a further investigation of Indian depredation claims. This act is as follows (paragraphed for convenience of reference):

"Indian depredation claims.—For the investigation of certain Indian depredation claims, ten thousand dollars; and in expending said sum the Secretary of the Interior shall cause a complete list of all claims heretofore filed in the Interior Department and which have been approved in whole or in part and now remain unpaid, and also all such claims as are pending but not yet examined,

on behalf of citizens of the United States,

on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States,

including the name and address of the claimants,

the date of the alleged depredations,

by what tribe committed,

the date of examination and approval,

with a reference to the date and clause of the treaty creating the obligation for payment,

to be made and presented to Congress at its next regular session;

and the Secretary is authorized and empowered, before making such report, to cause such additional investigation to be made and such further testimony to be taken as he may deem necessary to enable him to determine

the kind and value of all property damaged or destroyed by reason of the depredations aforesaid,

and by what tribe such depredations were committed;

and his report shall include his determination upon each claim,

together with the names and residences of witnesses and the testimony of each,

and also what funds are now existing or to be derived by reason of treaty or other obligation out of which the same should be paid."

His jurisdiction under this law was limited to claims "chargeable against any tribe of Indians by reason of any treaty." In his report to Congress, he is to refer to the "date and clause of the treaty, creating the obligation for payment." It included no claim which was authorized by statute, unless also authorized by treaty.

EXECUTIVE PRACTICE.

The rule of action of the Interior Department under this act and its subsequent extensions (Appendix A, *post*, p. 77) is found as follows by the Court of Claims (Finding VII, Record, p. 4):

"In considering Indian depredation claims under the act of March 3, 1885, and subsequent Indian appropriation acts, the practice of the Interior Department was to examine claims under said acts whenever there was a treaty with the tribe charged with the depredation containing provisions the same as or substantially similar to those contained in article 1 of the treaty with the Ogallalla band of Sioux Indians of October 28, 1865 (14 Stat. L., 747), and in article 1 of the treaty with the Sioux and other Indians of September 17, 1851 (Revision of Indian Treaties, p. 1048), and the Secretary of the Interior in his reports to Congress referred to such provisions as creating an obligation for payment.

"No discrimination was made by the Secretary of the Interior in the examination and allowance of claims under said acts between claims where the tribe charged was in a state of peace with or engaged in actual hostilities against the United States. Under said acts the practice of the Interior Department was that where a treaty existed between the tribe charged with a depredation and the United States the amity of such tribe was not jurisdictional before the Department; that whenever there was a treaty containing provisions the same or substantially similar to those contained in the treaties referred to, there was a liability against such tribe, whether such tribe has agreed by treaty to pay such claim or not."

In the findings in the case of Marks *et al. v.* The United States, No. 352 (heard with this case) the particulars of the Departmental practice are a little more fully stated. (Findings X–XII, Marks' Record, p. 13). It is there shown that the whole number of claims allowed by the Department under the act of 1885 was nine hundred and

fifteen and that in seven hundred and sixteen of these, the treaty contained no general promise to pay for depredations.

A full statement of the ground of the Departmental ruling appears in an opinion quoted in the Marks Record, p. 9.

The Department thus recognized treaty obligations as a ground, wider than statute, for Indian depredation claims, embracing both the claims arising in amity, recognized by statute, and those in war, resting (until 1872) entirely upon treaty.

The court finds both in this (Record, p. 5) and the Marks case that the reports of the Secretary of the Interior were laid before Congress in such manner that Congress was fully advised of the Departmental action. The finding in the Marks case is as follows (see that Record, p. 13):

"The annual reports to Congress by the Secretary of the Interior under the act of March 3, 1885, and subsequent acts were printed in the regular series of executive documents and were on the files of both Houses of Congress. They contained references to the treaty in each case creating the obligation for payment. The papers in each case, with the report of the Commissioner of Indian Affairs and the decision of the Secretary of the Interior, were transmitted to Congress with these annual reports and placed on the files of the House of Representatives."

CONDITIONS ON MARCH 3, 1891.

It is thus seen from this review of the history of this subject, that when the act of March 3, 1891, under which this suit is brought, was passed, the conditions were as follows:

1. A very large number of unsettled Indian depredation claims were pending before Congress and the Inte-

rior Department, demanding final adjustment. These had been the subject of repeated futile examinations.

2. These consisted of two classes:

(*a*) Claims recognized by a long series of statutes for depredations commited by Indians "in amity."

(*b*) Claims resting upon the breach of the Indians, in making war, of treaty obligations to keep the peace.

3. The latter class were uniformly held by the Secretary of the Interior to be within his jurisdiction both under the acts of 1872 and 1885, and were recognized as valid claims.

4. In considering claims under the act of 1885, treaties like that with the Indians commiting this depredation (treaty with Ogallalla Sioux of October 28, 1865, 14 Stat. L., 747, *post*, p. 104) were uniformly held by him to create an obligation for payment so as to give him jurisdiction under the act of 1885.

5. Congress was fully advised of his exercise of this jurisdiction.

II. SEPARATE CLASSES RECOGNIZED BY ACT OF MARCH 3d, 1891.

(a) Separate Classes shown by the Structure of the Act.

Any statute designed to make a final settlement of Indian depredation claims should be so ample in its terms as to provide for both these classes of pending claims. Such a comprehensive purpose is expressed by the title of the act of March 3, 1891. "To provide for the adjudication and payment of demands arising from Indian depredations." Its object is the final disposition of all such claims.

The jurisdiction granted by this act is defined in its first section (*ante*, p. 3, *post*, p. 77).

This grants a new jurisdiction to the Court of Claims. By the paragraph beginning "First," jurisdiction is conferred over Indian depredation claims arising "in amity." By the paragraph beginning "Second" this jurisdiction is extended to claims therein described.

The Court of Claims, saying, "Amity is a test of jurisdiction in all cases" (Leighton *v.* United States, 29 C. Cls., 317) considers that paragraph "Second" adds no additional class to the claims described in paragraph "First." The appellant contends that new classes are added, not dependent on amity, as required by paragraph "First" but possessing independent qualities admitting them to jurisdiction. What these classes are and whether this claim is within them will be considered hereafter.

It is necessary, in order to exhibit the appellant's contention, to enter into a somewhat minute scrutiny of the structure of this section.

In its first part this section gives a new jurisdiction to the Court of Claims, to consist of claims of "the following classes:" Then follow the classes, enumerated under separate paragraphs. The distinct demarcation of these classes, as separate, is emphasized by introducing each paragraph by the words "First," "Second," and "Third." This is the usual method of expressing different matters which are the subject or the object of the same action.

The paragraph beginning with the word "First" is not an independent sentence; it consists of the noun "claims," modified and limited by various phrases in the nature of adjectives. There is no predicate verb in this paragraph; it depends on the verb in the introductory lines. The paragraph is a complete enumeration of all the qualities requisite to the class of claims embraced in it.

The paragraph "Second" does not follow the form of the paragraph "First." The word "Second" might have

been followed immediately by the words "All cases which have been examined and allowed," etc. These would have then formed a part of the object of the verb in the introductory sentence, like paragraph "First," and the structure of the sentence would have been: "The Court of Claims shall have jurisdiction and authority to inquire into and finally adjudicate in the manner provided by this act * * * all cases which have been examined and allowed," etc. The "cases" would mean cases of the class for whose adjudication and payment the bill provides, to wit: "Indian depredation claims."

But the length of paragraph "First" removed paragraph "Second" to so great a distance from the subject of the sentence and the verb that the draughtsman of the paragraph (which we shall see originated in the Conference Committee) thought it essential to repeat the subject and the verb, doubtless intending greater perspicuity. In so doing, its form was varied. The word "Second" is therefore followed by the words: "Such jurisdiction shall also extend to all cases which have been examined and allowed," etc. The word jurisdiction is a repetition of the same word occurring in the first part of this section, and the word "such" indicates the purpose that the jurisdiction is to be the same as that given where "jurisdiction" has already been mentioned, namely, "jurisdiction (*i. e.*, of the Court of Claims) to inquire into and finally adjudicate, in the manner provided in this act." There is thus no structural dependence of paragraph "Second" upon paragraph "First." The paragraphs are independent of each other and both alike dependent upon the introductory portion of the section. The words of the paragraph "Second" do not relate back to paragraph "First," but relate back to the first part of the section. The jurisdiction under paragraph "Second" is

therefore independent of any qualifications or conditions upon jurisdiction under paragraph "First," and is the jurisdiction fully defined in the introductory words.

The use of the word "also" is significant. This is an emphatic conjunctive. It is always used to add to preceding statements. It shows here that the jurisdiction granted in the affirming part of this sentence is extended by paragraph "Second" to another class in addition to that embraced in paragraph "First."

Paragraph "Third" embraces a wholly separate class of cases. This further indicates the independence of the jurisdiction embraced in each of the three paragraphs.

It thus seems, from the structure of this section, that paragraph "Second" designates, as clearly as language is ordinarily used, a class of claims quite independent of the qualities described in paragraph "First."

Another forcible reason for this contention appears in the history of the passage of this act.

(b) Separate Classes Shown by the Legislative History of the Act.

Expressions of individual members in debate are not admissible to show the purpose of Congress in passing an act. It is, however, admissible to refer to the history of an act in its passage through Congress for enlightenment as to its purpose and meaning. (United States *v.* Union Pacific Railroad, 91 U. S., 79; American Net Co. *v.* Worthington, 141 U. S., 473.)

In Blake *v.* National Banks (23 Wall., 307, 317), the Supreme Court referred to the Congressional Globe and the Journal of the House of Representatives, showing the circumstances under which certain words were put into an act. The court said (p. 319):

"Under these circumstances we are compelled to ascertain the legislative intention by a recurrence to the mode

in which the embarrassing words were introduced, as shown by the journals and records, and by giving such construction to the statute as we believe will carry out the intention of Congress."

In the recent case of Holy Trinity Church *v.* United States, 143 U. S., 464, the reports of both Houses are quoted.

The Court of Claims in many decided cases has applied this doctrine. See Swan *v.* United States (19 C. Cls., 51, 71); Emery *v.* United States (19 C. Cls., 254, 264); Smith *v.* United States (19 C. Cls., 690); Walton *v.* United States (24 C. Cls., 372, 378); Austin *v.* United States (25 C. Cls., 454).

The history of the act of March 3, 1891, throws much light upon the proper construction of its jurisdictional section.

This act originated in the House of Representatives and was there known as bill H. R. 8150, 51st Congress. By this bill a special Court of Indian Depredations was proposed with authority to adjudicate claims of the following classes:

"First. All claims for property of citizens of the United States taken or destroyed by Indians without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

"Second. All claims by Indians under the protection of any treaty with the United States, who while peacefully residing and being upon any lawful reservation provided for them, or absent therefrom by authority and peacefully, shall have suffered a loss of property through unlawful destruction, or taking by white men, or by Indians of another tribe or nation then belonging within the United States, and not authorized to be upon the reservation where such destruction or taking occurred.

"Third. All just offsets and counter-claims to any claim of either of the preceding classes which may be before such court for determination."

(See Congressional Record, Vol. 21, part 10, pp. 9507, 9508, and Vol. 22, part 1, pp. 481-486.)

This bill, when reported to the Senate from the Senate Committee to which it had been referred after passing the House, contained the following definition of the classes of claims over which jurisdiction was given to the courts therein provided for:

"First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for:

"Second. All claims by Indians under the protection of any treaty with the United States, who, while residing and being upon any lawful reservation provided for them, or while absent therefrom by authority and peaceably conducting themselves, shall have suffered a loss of property through unlawful destruction or taking by white men or by Indians of another tribe or nation then belonging to the United States, and in amity therewith and not authorized to be upon the reservation or other place where such destruction or taking occurred.

"Third. All just offsets and counter-claims to any claim of either of the preceding classes which may be before such court for determination."

(See Congressional Record, Vol. 22, part 2, p. 1395.)

The foregoing provision which appears as subdivision "Second" was stricken out of the bill by the Senate (see bottom of 1st column, p. 2910, Cong. Record, Vol. 22, pt. 3).

As it passed the Senate the bill gave jurisdiction over the following classes of cases:

"First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, or tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge and not returned or paid for.

"Third. All just offsets and counter-claims to any claim of either of the preceding classes which may be before such court for determination."

(There was no reprint of this bill as it passed the Senate, but the Congressional Record shows all the amendments.

The debate appears in volume 22, part 2, pp. 1854–1857, part 3, pp. 2851–2864, 2901–2924.)

The provision appearing as subdivision "Second" in section one of the act of March 3, 1891, did not appear in the bill as passed by either House of Congress, but originated in the Conference Committee and became a part of the law by the adoption of the report of the Conference Committee by both Houses.

(See Congressional Record, Vol. 22, part 4, pp. 3543–3544, 3592, 3639.)

It is thus seen that the House of Representatives desired to give jurisdiction to the court over all claims for Indian depredations without qualification as to amity. The Senate, on the contrary, desired to restrict the jurisdiction solely to claims arising in amity.

The Committee of Conference of the two Houses had before it the House proposition for general jurisdiction over all Indian depredation claims and the Senate proposition for special jurisdiction over claims arising "in amity." The duty of a conference committee is to settle and adjust differences between the two Houses of Congress; its method frequently adopted for this purpose is a compromise. Such a compromise was adopted. The unlimited House provision was omitted and the limited Senate provision was retained, but to compensate for the omission a new provision embracing classes of claims not within the Senate provision, but within the House provision, was inserted in the bill. As the bill was passed

by the Senate, it embraced claims which had been recognized by the earlier statutes, but did not embrace claims resting for their validity upon treaty and recognized by later statutes (the acts of May 29, 1872, Secs. 445 and 466, Rev. Stats., and of March 3, 1885). As finally adopted by the Conference Committee, the act embraced both claims recognized by earlier laws and those recognized by treaties and later laws. In addition to this, claims already allowed by the Secretary of the Interior were given a standing in court upon their merits.

The circumstances of the passage of this act show clearly that it was the purpose of Congress, as expressed by the bill reported from the Conference Committee, to extend the jurisdiction of the court beyond the single narrow class limited by the Senate bill, while restricting the broad provision originally made by the House.

The foregoing premises show that it was the purpose of Congress to include several classes of cases within the jurisdiction of the court. This purpose is evidenced (1) by the conditions existing at the passage of the act; (2) by the form of the act; and (3) by the circumstances under which the act passed the two Houses of Congress.

III. THIS CLAIM WITHIN THE JURISDICTION IN PARAGRAPH "SECOND."

Considering this position established, it now becomes necessary to ask whether the claimant's case is embraced in paragraph "Second." The claimants contention is that this paragraph embraces two classes of claims: the first, those allowed by the Interior Department prior to 1891; the second, those which the Interior Department had a right to consider under the act of March 3, 1885, these being claims resting on treaty obligations. It is asserted that this claim is within both these classes.

The Court of Claims erroneously supposed (Leighton *v.* United States, 29 C. Cls., 312) that the claimant contended that the classes of claims embraced in this section are necessarily exclusive of each other. The contention is that there are three qualifications, one by paragraph "First" and two by paragraph "Second," the possession of either of which admits to jurisdiction. A claim can possess more than one of these qualifications; the appellant contends that his case possesses all three. The classes of claims might well be represented graphically by three overlapping circles.

(a) An Allowed Claim Within the Court's Jurisdiction.

We have seen that paragraph "Second" provides that jurisdiction shall extend to "cases which have been examined and allowed by the Interior Department." The simplest manner of determining whether the Court of Claims had jurisdiction of this case, is to find whether on March 3, 1891, the claim had been examined and allowed by the Interior Department. The Court of Claims (Finding VI, Record, p. 4) has found that the claim was allowed in 1874 under the act of 1872 and again in 1888 under the act of 1885. That being known, there is no reason why the Court should not assume jurisdiction of the case, and adjudicate it under the terms of the act.

A LITERAL CONSTRUCTION PREFERRED.

Where the words of a statute are plain, it is the duty of the courts to enforce a literal construction, and not to seek for other meanings which might produce a result more satisfactory to the reason of the judges, had they been the legislators. This court has said (Ruggles *v.* Illinois, 108 U. S., 534):

"But Vattel's first general maxim of interpretation is that 'it is not allowable to interpret what has no need of interpretation,' and he continues: 'When a deed is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusions—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it.' Vattel's Law of Nations, 244. Here the words are plain and interpret themselves".

Special reasons exist why this statute should be construed in this way. Its existing form was adopted as a compromise between conflicting ideas. It would be impossible to ascertain exactly upon what theory the compromise was agreed upon. Perhaps those who favored a limited jurisdiction had a very different idea of its meaning from those who favored an unlimited jurisdiction. The court can not follow the view which one or the other legislator might have had. It must take the statute as enacted and give to it such meaning as its words fairly warrant, according to their plain and literal import, as long as impossible absurdities are avoided.

THE CONSTRUCTION REASONABLE.

In the face of the plain meaning of the words of the statute, it is unnecessary to try to discover the exact motive leading the legislative mind to give this preference to allowed claims, yet a good reason can readily be found. The past jurisdiction of the Secretary of the Interior in Indian depredation claims has been dependent upon the existence of one or two conditions, either amity or treaty obligation (*ante*, p. 14). His allowance of a claim necessarily involved a finding of the one or the other of these facts. Both of these classes of claims have been subjected to one hearing after another under different stat-

utes; by this act they are transferred to a new tribunal for another trial, but under the same jurisdictional limitation. Congress thus recognized as valid both classes of cases for which it had in the past provided a futile hearing in the Department, and accepted the decision of the Secretary of the Interior, when he allowed a claim, as final upon the question of his jurisdiction. Having given the same jurisdiction to the court, it is in allowed cases to proceed at once to the merits. The preliminary questions are not again to be litigated. *Interest reipublicae ut sit finis litum.*

This is a sensible theory of the act, accounting for its provisions in a reasonable way. It follows the natural meaning of its terms without leading to any absurdity. It should be accepted as the proper construction of the act whether or not it should be considered the wisest possible legislation.

THE EFFECT OF RE-OPENING.

The defendants object to the court taking jurisdiction of this as an allowed claim, because the claimant, under Section 4 of the act of March 3, 1891 (Appendix A, *post*, p. 80), filed an election to re-open the case and try the same before the court. The statute says:

"That all unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and subsequent Indian appropriation acts, shall have priority of consideration by such court,

"and judgments for the amounts therein found due shall be rendered, unless either the claimant or the United

States shall elect to re-open the case and try the same before the court, in which event the testimony in the case given by the witnesses and the documentary evidence, including reports of Department agents therein, may be read as depositions and proofs:

"*Provided*, That the party electing to re-open the case shall assume the burden of proof."

The United States contends that after the re-opening, the case stands exactly as if never allowed, subject to all defences whatever. The claimant responds that this is not a question of a defence on the merits; but of jurisdiction. That is given by the fact of its having once been allowed; no subsequent act can deprive the court of its jurisdiction, acquired on account of this past action. Re-opening the allowance changes its legal effect; it does not make the case one which has not been "examined and allowed." What is to be done by the court when jurisdiction is thus acquired is considered hereafter (*post*, p. 53).

WAS THIS A LAWFUL ALLOWANCE?

The Court of Claims raises in its opinion a ground of objection to its jurisdiction of a most radical nature. Its argument (Leighton *v.* United States 29 C. Cls., 313) is that there was no allowance of the claim, because the Secretary of the Interior never had jurisdiction over it by reason of the want of amity of the Indians.

There are three answers to this position:

(*a*) The jurisdiction of the Secretary was not limited by amity.

(*b*) The decision of the Secretary upon the fact of amity or treaty obligation was conclusive as to his jurisdiction.

(*c*) The reference to allowed claims in the act of March 3, 1891, relates to the fact of allowance and not to its correctness.

(*a*) In an earlier part of this brief (pp. 8–14) it has been shown that treaty obligation, equally with amity, was a ground of jurisdiction, and that the Secretary of the Interior considered and decided a great number of cases arising in war. In a later part, it will be shown that there was a treaty obligation in this case (*post*, pp. 35–48).

THE SECRETARY'S DECISION NOT *ultra vires*.

(*b*) It might have been objected before the Secretary of the Interior that the tribe was neither in amity nor under treaty obligation; but one or the other of these facts having been passed upon by him, his allowance became a valid allowance, subject to attack only on its merits, as provided in the act, and not on jurisdictional grounds.

The Secretary of the Interior under the act of 1885 was required to report to Congress his "determination" upon each claim. Before he could determine and report any case the act required him to decide a number of matters: (1) The pendency of the claim, (2) the citizenship of the claimant, (3) the obligation of the Indians, (4) the treaty creating the obligation, (5) the kind and value of the property taken, (6) the tribe committing the depredation, (7) the treaty or other funds available for payment. Congress submitted all these matters to the Secretary for decision. A finding on all of the points was necessary; most of them had to be separately reported to Congress. The appellees draw a distinction between these various requisites to an allowance. It is asserted that some are jurisdictional and that, if the Secretary decided these wrongfully, his acts were wholly void and his intended allowance was no allowance. Such, they contend, are citizenship and treaty obligation. An erroneous decision of others of these facts, the appellees doubtless admit, would be mere error.

The distinction between jurisdictional matters, in the absence of which the act of a tribunal is wholly void, and matters which a tribunal is authorized to determine within its jurisdiction has been much discussed; the principles involved are very clear.

In Elliott *v.* Peirsol (1 Peters, 340), quoted with approval *In re* Sawyer (124 U. S., 220), this court said:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

The same doctrine is stated in an opinion by Justice Miller in Cooper *v.* Reynolds (10 Wall., 315):

"The record of this case is introduced collaterally as evidence of title in another suit between other parties and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be. Nor can it disregard that judgment, or refuse to give it effect on any other ground than a want of jurisdiction in the court which rendered it.

"It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law."

The courts have frequently defined jurisdiction.

In United States *v.* Arredondo (6 Peters, 691, 709), this court said:

"The power to hear and determine is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action."

In Hunt *v.* Hunt (72 N. Y., 229), it is said:

"Jurisdiction of the subject-matter is power to adjudge concerning the general question involved and is not dependent upon the state of facts which may appear in a particular case, arising or which is claimed to have arisen, under that general question."

In Hopkins *v.* Commonwealth (44 Mass., 463), the court said:

"To have jurisdiction is to have power to inquire into the fact, to apply the law, and to declare the punishment in a regular course of judicial proceeding."

The difficulty, however, is, as expressed in Cooper *v.* Reynolds (10 Wall., 316), in the application of the general rule:

"It is as easy to give a general and comprehensive definition of the word jurisdiction as it is difficult to determine in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make."

Some light may be thrown upon the applicability of these principles to this case by reference to a few decided cases. The act of a Probate Court in granting administration upon the estate of a person subsequently found to be alive or upon an estate upon which an executor is already acting, is wholly void (Griffith *v.* Frazier, 8 Cranch, 9). The Court of Claims has decided (King *v.* United States, 27 C. Cls., 533) that the act of a Probate Court in granting jurisdiction over the estate of a person

declared in the petition for administration to be a non-resident without assets in the jurisdiction, is wholly void. But it is equally well settled that where the law of a State gives a right to a court to grant administration upon the estate of persons dying while resident in the county, a grant of administration, in mistake of fact, upon the estate of a person who died while domiciled in another county can not be questioned collaterally (Raborg *v.* Hammond, 2 Harris & Gill, 49).

In the two cases already cited in which this court defines the principle, the facts are instructive.

In Elliott *v.* Peirsol (1 Peters, 328) a County Court had issued an order to a clerk to amend an acknowledgement of a deed executed before him. The acknowledgement was disputed in a collateral suit in the Circuit Court of the United States. The Supreme Court held that the order of the County Court was void because the law gave it no jurisdiction to issue an order of the kind.

In Cooper *v.* Reynolds (10 Wall., 308) proceedings had been taken under the attachment laws of Tennessee and the objection was made in a collateral inquiry that the proceedings had not been in accordance with the statutory requirements. The Supreme Court held that when the State Court had taken the *res* into its possession, jurisdiction over the subject-matter was required and a failure to comply with the requirements of the statute, no matter how important, either before or after the seizure, did not affect the jurisdiction.

In Dunlap *v.* The Town of Dane (29 Wis., 431) the court held that where the law required the petition of fifteen resident free-holders as preliminary to laying out a highway, the action of the Board of Supervisors was void in the absence of such petition because without jurisdiction.

In the application of these principles to the pending

case, it may confidently be asserted that when the Secretary found a pending claim for Indian depredations, he had power to decide it.

When Congress specially directs him to decide and report upon a particular fact of treaty obligation his decision on that fact is not *ultra vires*. If, deciding this fact in the claimant's favor, he allows the claim, the act of allowance is within his jurisdiction and valid.

His error is subject to correction either by Congress, which reserved final action to itself under the act of 1885, or by this court in accordance with the procedure established by the act of 1891 in those particulars in which a right of review is granted.

ANALOGY IN MANDAMUS CASES.

Light is thrown upon this question by the rule established by this court for granting a mandamus or injunction against officers of the Executive Departments.

In Decatur *v.* Paulding (14 Peters, 497), the distinction between ministerial duties and those involving discretion is clearly set forth. The court there say (p. 515):

"If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a Department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties."

See also Marbury *v.* Madison (1 Cranch, 137); Kendall *v.* United States (12 Peters, 610).

Noble *v.* Union River Logging Company (147 U. S., 165) is the latest and one of the most elaborate discussions of the powers of the head of a department upon matters within his jurisdiction. The Secretary of the Interior had approved the plats of a railroad company and this act vested it at once with a right to certain public lands; proof was presented to his successor, convincing him that the railroad company had no existence to warrant it to file maps or receive land. He proceeded to revoke the grant. A bill was filed to enjoin the latter Secretary from this action. It was urged in defense that the predecessor's action in making the original grant was without jurisdiction for want of a qualified grantee.

The court held that, without regard to the fraud of the company or to the conditions of its existence, the action of the former Secretary was valid because within his jurisdiction, and was final until proceedings in equity were taken to set it aside, according to the method provided by law in such cases.

A former case was approved in the following language (p. 175):

"In French *v.* Fyan, 93 U. S., 169, it was held that the action of the Secretary of the Interior identifying swamp lands, making lists thereof and issuing patents therefor, could not be impeached in an action at law by showing that the lands which the patent conveyed were not in fact swamp and overflowed lands, although his jurisdiction extended only to lands of that class."

The distinction is carefully drawn between matters jurisdictional, without which the act of a court is a mere nullity, and matters *quasi* jurisdictional, which can not be attacked collaterally. The opinion says (p. 173):

"There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, can not be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a Federal court, which, when found by such court, can not be questioned collaterally; * * * and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act."

It thus appears that if the act of a Secretary would be wholly void because outside of his jurisdiction, he can be restrained from it by a bill of injunction.

Let this doctrine be applied to the present case. If a claimant whose claim is about to be examined by the Secretary of the Interior under the act of 1885, or an Indian tribe against which such a claim was made, conceived that his or their rights would be injuriously affected by the examination, would a bill of injunction have prevented the Secretary from proceeding? Or, on the contrary, if the Secretary had declined to act on a claim on the ground that there was no treaty obligation, could the claimant have secured a judicial decision of this question through a mandamus upon the Secretary?

Congress had vested in the Secretary of the Interior the duty of determining certain claims and, among other things, of reporting to Congress the treaty creating the obligations of the Indians. The courts must have declared that one of the very matters about which the Secretary was to exercise discretion was the treaty obliga-

tion and that his decision on this point was not ministerial, but within his executive discretion.

If mandamus or injunction would not lie, then the act of the Secretary of the Interior was not void, but, if he made a mistake, it was error, to be corrected within the limitations prescribed by the act of 1885 itself, or by subsequent statutes.

The allowance by the Secretary of the Interior, whether correct or not, either in fact or law, was an act within the scope of his authority; the claim is, therefore, entitled to all rights granted by the statute to claims examined and allowed.

ACTUAL ALLOWANCE INTENDED.

(*c*) It is very clear, by a brief investigation into the history of these cases, that Congress meant by the words "examined and allowed" to refer to cases actually allowed and not to cases, in the opinion of a revisory tribunal, properly allowed.

It has already been seen that the Court of Claims has found the following facts (Record, pp. 4, 5; Marks' Record, pp. 12, 13; *ante*, p. 12):

(1) That the Secretary of the Interior disregarded the condition of amity in his allowances under the act of 1885, allowing all claims arising either in war or at peace, where he found what he deemed a proper treaty. How many of his nine hundred and fifteen allowances were for war losses does not appear.

(2) That the Secretary of the Interior held that there was a treaty obligation for payment wherever a treaty of subjection and peace was made, even if it contained no specific promise for payment for depredations out of treaty funds. Not less than three-fourths of all his allowances referred to such treaties.

(3) That Congress was advised by the reports of the

Secretary of the Interior of his decision and of the treaties which he held to create an obligation for payment.

It is plain that Congress knew what these fundamental and wide-reaching rules of the Secretary of the Interior were, governing his allowances.

Is it possible that Congress, with this knowledge, would have given the Court of Claims special and unqualified jurisdiction of claims "examined and allowed" had it meant to exclude so large a proportion of claims actually allowed?

Had Congress considered his known theories of allowance fundamentally erroneous, must not some limitation of the word "allowed" have been used to restrict the special right to cases "properly allowed" or "allowed under sufficient treaties"?

Is it possible had Congress disapproved the principal rules adopted by the Secretary of the Interior, that any special respect would have been shown to his allowances?

The only rational theory, consistent with the proved legislative knowledge of these rules of decision, is that Congress meant to give the special jurisdictional privilege to claims actually allowed, without subjecting them to an examination of the correctness of that decision as a precedent to jurisdiction.

It is insisted that the court is entirely in error in holding that a claim like this was not allowed; and that the action of the Secretary of the Interior was an allowance; and under the statute, gave jurisdiction to the court to consider and decide the claim on its merits.

THE ALLOWANCE UNDER THE ACT OF 1872.

Whatever may be the effect of re-opening upon the allowance under the act of 1885, or whatever may be the ambiguities of jurisdiction under that act, there can be no such questions as to the allowance under the act of 1872

The claimant did not elect to re-open this; being for a larger sum (Record, p. 4) he might have accepted it. The jurisdiction of the Secretary under that act extended to claims under "laws or treaty stipulations" and he clearly had a right to allow a claim if he thought the law or treaty stipulation sufficient. The validity of the allowance under the act of 1872 can not be questioned.

Congress had before it the distinction between claims allowed by the Secretary under the acts of 1872 and 1885. The jurisdictional privilege of Section 1 is given to claims "examined and allowed" without regard to any particular law; the privilege of *prima facie* validity given in Section 4 is restricted to claims allowed under the act of 1885.

(b) Jurisdiction Complete Under Treaty Obligation.

Paragraph "Second" of this act extends the jurisdiction of the court, not only to claims examined and allowed by the Interior Department, but also to such cases as were authorized to be examined under the Indian appropriation act of Congress approved March 3, 1885, and subsequent acts. The act of March 3, 1891, thus fails to contain in itself a complete definition of its jurisdiction. It confers jurisdiction on the court by reference to an earlier jurisdiction conferred on the Interior Department and exercised by that Department for six years. For a definition of the later act, it is necessary to revert to the earlier. The act of March 3, 1885, is printed, *ante*, p. 11, and *post*, p. 76. It has already been seen that it provides for the investigation of claims resting upon treaty obligation (*ante*, pp. 10, 14), that wherever a treaty existed containing provisions similar to Article I of the treaty of October 28, 1865 (*post*, p. 104) which was in force when this claim originated, the Interior Department uniformly

accepted such provision as the obligation for payment (*ante*, p. 12), that in seven hundred and sixteen out of the nine hundred and fifteen allowed claims the treaty contained no specific provision to pay for war losses, and (*ante*, p. 12) that Congress was informed of these decisions. The obligation was inferred by the Secretary from the existence of a treaty agreeing to keep the peace, and binding the tribe by the laws of the United States. If the tribe was at peace, then its promise to accept all the laws of the United States bound it to pay for depredations, under the acts of 1834 and other like acts, providing payment in cases of amity. If the tribe was at war, its obligation rested upon its failure to keep its covenant of peace; and it must respond in damages to the exact extent to which citizens had suffered loss upon this account.

CONFIRMATION OF EXISTING CONSTRUCTION BY RE-ENACTMENT.

The Court of Claims in two cases has recognized that Congress knew the executive construction of the act of 1885 and has construed the act of 1891 in the light of that knowledge.

In Valk *v.* United States (28 C. Cls., 245), that court used the following language:

"The jurisdictional act of 1891, March 3, chapter 538, which we are now considering, adopted the language of the act of 1885, to which it refers, and in our opinion Congress intended to use therein the words "citizens of the United States," in the sense that had been given by the Interior Department to the same words in the act of 1885 for the past six years, which, it must be presumed, was known to Congress."

In Johnson *v.* United States (29 C. Cls., 5), the court substantially repeated this language, as follows:

"The jurisdictional act of 1891, March 3, chapter 538, which we are now considering, adopted the language of the act of 1885, to which it refers, and in our opinion Congress intended to use therein the words "citizens of the United States" in the sense that had been given by the Interior Department to the same words in the act of 1885 for the past six years, which, it must be presumed, was known to Congress. In this we do but adopt and follow the ruling of the Interior Department under said act of 1885, the general policy of which, except as to jurisdiction, Congress seems to have intended to continue."

Knowing the jurisdiction exercised by the Department under the act of 1885, Congress conferred the same jurisdiction upon the court. Had the known jurisdiction, as continually exercised by the Interior Department, been different from that which Congress wished the court to exercise, it would have used some more definite way of conveying that wish than by granting jurisdiction to the court by a reference to the act under which the Interior Department exercised its jurisdiction. No clearer means, otherwise than by special expression of approval, could have been used by Congress to show that the same rules of jurisdiction should be followed by the court as had been followed by the Department. The form of the act denotes a purpose of continuity of jurisdiction.

The principle here involved is stated by the text writers and settled by numerous authorities. Endlich on the Interpretation of Statutes, Sec. 368, says:

"Where, indeed, the two acts *in pari materia* are almost precisely alike, in the provisions under construction, it is said that the decisions upon the earlier will be considered as authority in the interpretation of the later act. In other words, the re-enactment of a statute which has received a judicial construction, in the same, or substantially the same terms, amounts to a legislative adoption of such construction."

Duramus *v.* Harrison, 26 Ala., 326, was an action involving the construction of a section of the code which had been construed in its original act prior to the codification. The court there say (p. 330):

"We must take it for granted that at the time the code was adopted the legislature knew the construction which had been placed on the former statutes above referred to, by the several decisions above cited, and if with this knowledge the legislature has re-enacted in the code provisions which are substantially the same as those contained in the former statutes, such re-enactment is a legislative adoption of the known construction of those provisions."

In Myrick *v.* Hasey, 27 Maine, 9, the court say:

"When a statute has received a judicial construction of the court of the State where it was in force, and the same statute has been re-enacted with the same provision, which has been the subject of judicial construction and decision, the legislature are understood to have adopted the construction given."

In Cota *v.* Ross, 66 Maine, 161, 165, the following language was used:

"When the legislature adopt or re-enact a statute, its previous construction as settled by the courts is adopted. After the repeated construction of a statute, its re-enactment upon the revision of the statutes is always regarded as a legislative affirmance of the statute as previously construed by the judiciary. If the doctrine of *stare decisis* is ever to have force, it is when the repeated adjudications of the courts have received the legislative sanction upon a general revision of preceding statutes."

See also Tuxbury's App., 67 Maine, 267; Frink *v.* Pond, 46 N. H., 125 (following Tomson *v.* Ward, 1 N. H, 9); State *v.* Swope, 7 Ind., 91; Evans *v.* Ross, 107 Pa. St., 231; Gould *v.* Wise, 18 Nev., 253; Woolsey *v.* Cade, 54 Ala., 378; *Re* Murphy, 23 N. J. L., 180.

It is difficult to see how any other doctrine could be asserted if continuity of construction is to be preserved. The uncertainty of the meaning of statutes, no matter how carefully drawn, impresses every student of statutory construction; every rule which aims to create an adherence to settled construction ought to be carefully conserved.

THE REASON OF THE RULE.

The Court of Claims responds to this contention (29 C. Cls., 323) by stating that this rule, so well settled by many authorities, applies only in cases of authoritative judicial construction and not to executive construction. In support of that contention they refer to the case of Swift Company *v.* The United States (105 U.S., 691; 111 U.S., 22).

The apparent exception contained in that case is a confirmation of the reason of the rule. The authorities cited show that the reason for this rule is that the legislature knew the meaning judicially adopted, and would not have used the same words unless it wished the same construction continued. If the known construction was to be overturned, a change of language would have indicated that purpose. The reason of the rule is not any peculiar sanctity of judicial construction; legislatures constantly amend laws to correct hardships consequent upon judicial constructions. Contemporary executive construction has been given a very high measure of authority by this court (United States *v.* Moore, 95 U.S., 763; United States *v.* Pugh, 99 U.S., 269; United States *v.* Graham, 110 U.S., 221).

In the case of the Swift Company, the construction in question was of a somewhat difficult mathematical point, relating to a special matter embraced in a general and important law. No one could declare that, in the re-enactment of the existing law, the attention of Congress

was directed to this particular construction. The reenactment was not intended to approve the executive construction, because that construction did not appear to have been known to Congress. In this case, the executive construction was pointedly brought to the attention of Congress, and Congress knew that allowances were being made under these very treaties which contained only a general obligation to keep the peace. The reason of the rule did not exist in the one case; it exists to its fullest extent in the other. The recognized rule ought, therefore, to be enforced.

It must be borne in mind that the decision of the Interior Department was not upon the merits of the cases; but affected its jurisdiction, treaty obligation being a preliminary essential to the jurisdiction under the act of 1885. Congress transferred this jurisdiction from the Secretary of the Interior to the Court of Claims. The question of the jurisdiction conferred and exercised was before Congress; by this transfer it indicated its wish for the continuation of the same jurisdiction.

The desire of Congress for continuity of jurisdiction and decision between the earlier laws and the act of 1891, is shown not only in the part of section 1 under consideration and in section 4 (*ante*, p. 24), both giving privileges to allowed claims, but by two provisions in section 4 (*post*, p. 80), allowing the papers on file in the Department, including the reports of Departmental agents, to be used as evidence in court and by section 13 (*post*, p. 83), where the change of jurisdiction is referred to as "the transfer of said claims and business to the court." All these provisions indicate an essential unity of proceeding.

THE DEPARTMENTAL CONSTRUCTION CORRECT.

On the merits of the question, the Interior Department was right in its construction.

The act of 1885 in requiring the funds to be pointed out from which payment should be made and section 6 of the act of 1891, requiring the judgments to be first paid out of the Indian funds, alike indicate the purpose of Congress to hold the Indians responsible for their acts.

The Indians who have pledged themselves to peace, on making war, are bound to suffer the consequences. The rule is one strictly of justice; it follows wrong-doing by a penalty commensurate with the extent of the wrong-doing. It gives to the innocent a recompense for the wrong done him and takes that recompense from the wrong-doer. While it relieves the sufferer, it enforces upon the Indians the best of rules, their responsibility for their own wrong-doing.

The Court of Claims answers this position by an application of the doctrines of international law in relation to belligerent rights. They say (Leighton *v.* United States, 29 C. Cls., 305):

"It was said by Justice Washington in a concurring opinion in the case of Worcester *v.* Georgia (6 Pet., 582): 'The language used in treaties with the Indians should never be construed to their prejudice.' The United States being the superior power and having sought such treaties they should not be so construed as to deprive the Indians of belligerent rights. Losses occurring in war must be suffered by him upon whom the loss falls. Such are the misfortunes of war, and unless the political departments of the Government see fit in the exercise of their power to enforce payment of such losses by way of indemnity or otherwise, the citizen is without a remedy except by petition to Congress."

And in another place (29 C. Cls., 317):

"Or it may have been a defensive war on the part of the band or tribe, and 'justifiable self-defense is no breach of the treaty of peace.' It is a natural right which can not be renounced. A promise to live in peace is only a

promise not to attack without cause and to abstain from injuries and violence, unless the violence offered will admit of no other remedy than the exertion of open force, in which case it may be lawfully exercised."

And in another place (29 C. Cls., 325):

"The Indians being within the jurisdiction and control of the United States as 'domestic dependent nations,' it is their duty to submit to the constituted authorities, but if, instead of submitting, they resort to arms, as a band, tribe, or nation, to maintain or contest their rights, a want of amity *in fact* arises; and by reason of their recognized tribal relations by the political departments of the Government and the favorable rules of interpretation to which they are entitled their rights as belligerents will be respected by the court in construing the remedial act of 1891."

The response to this is in the peculiar relations between the Indians and the United States. It is a mistake to apply doctrines of international law to these relations. They are *sui generis* and must be settled on the principles specially applicable to them.

In the case of Cherokee Nation *v.* Georgia (5 Pet., 1, 17), this court, through Chief Justice Marshall, defined the Indian tribes as "domestic dependent nations." Later radical statutes have been but the assertion of the powers implied in this definition.

The sovereignty of the United States was directly asserted by this court by Taney, C. J., in the United States *v.* Rogers (4 How., 567, 572), quoted with approval in United States *v.* Kagama (118 U. S., 380):

"The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States, as a place of domicile for the tribe, and

they hold and occupy it with the assent of the United States, and under their authority. * * *

We think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority."

The powers of sovereignty, always possessed by the United States and thus recognized, were not always enforced. A measure of independence was permitted to the Indians, which Congress might at any time have abridged. The reserved powers of Congress were asserted by the act of March 3, 1871 (16 Stat. L., 566; Rev. Stat., Sec. 2079), forbidding future treaties with the Indians.

This divested them of the semblance of nationality which had previously been permitted them and declared most directly their subjection to the sovereignty of the United States. Since then all negotiations with the Indians have been by way of contract or agreement, recognizing them as *quasi* corporations or associations.

In the past few years the assertions of sovereignty over the Indians have constantly increased. The act of March 3, 1885 (23 Stat. L., 385, 1 Supp. R. S., 482), extended the criminal laws of the United States and of the Territories over the Indians personally. (United States *v.* Kagama, 118 U. S., 375.) The acts of March 2, 1887 (24 Stat. L., 449, 1 Supp. R. S., 554), of February 15, 1888 (25 Stat. L., 33, 1 Supp. R. S., 578), of June 9, 1888 (25 Stat. L., 178, 1 Supp. R. S., 589), and of March 1, 1889 (25 Stat. L., 783, 1 Supp. R. S., 670), are all enactments dealing with the Indians individually, thus invading the tribal existence. (See note to the last act, 1 Supp. R. S., 670.)

In United States *v.* Kagama this court thus defined the rights of the Indians (118 U. S., 381):

"Following the policy of the European governments in the discovery of America towards the Indians who

were found here, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserve their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

In the same opinion, commenting on the case of Cherokee Nation *v.* Georgia (5 Pet., 1), the court said (p. 382):

"In the first of the above cases it was held that these tribes were neither States nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States."

Their status is further defined in the same opinion (pp. 383, 384):

"It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. * * *

"The power of the General Government over these remnants of a race once powerful, now weak and dimin

ished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

The Indian allotment act of February 8, 1887 (24 Stat. L., 388, 1 Supp. R. S. 534, and its amendment of February 28, 1891, 26 Stat. L., 794, 1 Supp. R. S., 897), still further invade the tribal autonomy and aim to destroy it entirely by ultimately making the members of the tribe citizens of the United States. All these acts are assertions of rights always existing, but not enforced.

It is also to be remembered that in nearly all treaties (Appendix B, p. 84) the Indians have expressly declared their subjection to the laws of the United States.

"The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States, has always been an anomalous one and of a complex character." United States *v.* Kagama, 118 U. S. 381.

"They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father." Cherokee Nation *v.* Georgia, 5 Pet., 17.

Any attempt to apply the doctrines of international law to these relations without all necessary changes must result in disaster. These apply to foreign independent nations; the Indians are, and always have been, both domestic and dependent and were nations only by courtesy.

An insurrection by Indians is crime; it is war only to the extent to which the political department of the Government grants them belligerent rights. A tribal outbreak is no better than mob violence. The Indian, who

joins in war, is a criminal under the domestic law, if the United States chooses to enforce its authority. He breaks the law as much as a citizen of the United States who joins a mob. The tribe gains no belligerent rights by their conspiracy; these exist merely by concession. Hostile acts by Indians are not an exercise of the natural right of self-defense which can not be renounced; they are a breach of the duty owed to the sovereign authority. No right of war can be recognized by courts, against a sovereign authority to whose laws, both civil and criminal, the war-maker is subject.

If there is no war, then the tribal conspirators are bound to answer for tribal wrong-doing from the tribal funds. If the United States concede belligerent rights, it does not destroy the wrongful character of the war or make it the less a breach of allegiance or of treaty obligation for which the tribal property should answer.

A striking illustration of the duty of the Indians to obey the law, even in the face of serious provocation, has been shown in the recent episode concerning the Bannock Indians. The facts now understood are that these Indians, while in the exercise of a treaty right, were arrested for a misdemeanor under State law; on attempting to escape from unlawful imprisonment, they were killed. Had these Indians belonged to a foreign nation, no one could question the right, or indeed the duty, of that nation to make war unless prompt redress was given. The Indian tribe, however, recognized their duty of peace toward the United States, their sovereign, and refrained from insurrectionary acts. Had they entered into active hostilities, they would have been, in the eye of the law, wrong-doers in spite of the provocation.

CASES OF SPECIAL PROCEDURE.

It may, perhaps, be contended that where a treaty provides for special procedure to be followed, to charge

the tribal funds for depredations, no obligation can arise until this procedure is completed. That question does not arise in this case because the obligation here, under the treaty of 1865 (*post*, p. 104), is a general obligation to cease hostilities. Yet it will be noticed in nearly all the treaties providing such procedure (such as the Kiowa treaty of October 21, 1867, *post*, p. 106), that this is applicable only to depredations committed by Indians while peace prevailed. The demand for the wrong-doers, as there provided, could hardly be made when the whole tribe was jointly engaged in warfare and all were equal participators in the wrong.

IRRATIONAL CONSEQUENCES.

A striking argument in favor of the rule adopted by the Secretary of the Interior in regard to these treaties, is found in the irrational results of the opposite rule. It is contended by the defendants and held by the court below, that where the tribe is in amity, the depredation of an individual, or of any considerable minority of the tribe, is a cause of action under the act of March 3, 1891, and must be paid for out of the tribal funds (Leighton *v.* United States, 29 C. Cls., 326, *post*, p. 55); if the tribe is hostile and commits the depredation as a body, the tribal funds are not chargeable. The act of an individual creates a charge upon the tribe; the act of the tribe releases the tribal funds from any charge. This consequence, hardly justifiable to the ordinary sense of reason, results from an attempt to apply the belligerent rights granted by international law under conditions of an entirely different character.

Another like consequence would result from the same doctrine. It is not infrequent, when an Indian war takes place, that turbulent members from other tribes, not

concerned in the war, join the attacking parties and assist in the depredations. If the decision of the court below be correct, these casual wrong-doers, who separate from their tribe and with the war parties of another tribe commit depredations, involve their own tribes in responsibility for their actions. Yet the tribe actually carrying on the war is free from responsibility because of their belligerent rights.

The attempt to apply the doctrines of international law to entirely different conditions should be abandoned, and a rule should be adopted, consistent with sound reason and the decisions of the department charged with responsibility for the Indians. For depredations by tribes at at war, the tribal funds should respond.

RESPONSIBILITY FOR WAR LOSSES.

In the case of Valk *v.* United States (28 C. Cls., 246), the court used this argument in support of its position:

"The jurisdictional act, as we interpret it, is in accord with the general policy of the Government and of all governments not to pay for property destroyed in war."

It may have been an older rule of international law that governments are not liable to their own citizens for damages by the enemy in war. Notable exceptions are, indeed, known to this rule.

It was never in force in this country until the civil war. Before that time, individual losses were borne by the Federal treasury. See in support of this the list of appropriations made after the Revolution and the war of 1812 to pay for damages by the British, as stated in Exhibit G, *post*, p. 119. A different rule has prevailed in regard to the late war, but this was adopted on account of the magnitude of that war and the inability of the Treasury to assume any more than the obligations of

strict contract. The Court of Claims has itself recognized a legal right to compensation in a very wide class of war losses (Grant *v.* United States, 1 C. Cls., 41).

After the war of 1871, France, in spite of the enormous indemnity levied by Prussia, adopted a rule in accordance with the earlier French precedents, although entirely at variance with that stated by the Court of Claims. In a French official communication published in The Law of Claims against Governments (H. R. Rep. 134, 43d Cong., 2d Sess., p. 75) the action is thus set forth:

"The law of September 6, 1871, established the principle of solidarity, in accordance with which the legislator designed to cause the whole nation to aid in making good the material damages of all kinds caused by the war. This law allowed, provisionally, the sum of 100,000,000 (francs) to be distributed among the invaded departments; and also, the sum of 6,000,000, which latter was specially appropriated to the payment of damages caused by the re-instatement of the lawful power in Paris after the insurrection of the commune. The most liberal spirit presided over the application of the principle of indemnification. No distinction was made on account of the causes of the damages. All 'persons who had suffered material losses in consequence of the war were allowed to present their claims, whether for war contributions, fines, or anything of the kind.' * * *

"The National Assembly, in passing the two indemnity laws of September 6, 1871, and April 7, 1873, intended to grant relief to all persons who, having suffered from the war, could not, in strictness, base an appeal for indemnity upon any right thereto. These measures had thus left certain classes of losses unprovided for, for the reparation of which it was thought that the parties interested had ground for an action before the courts. Such especially were the losses occasioned by the preventive measures adopted in certain localities at Paris, Lyons, Belfort, etc., for the requirements of the national defense, which had caused the destruction of a considerable

amount of property. Experience having shown, however, that jurisprudence was far from being fixed in this matter, that on a certain number of points the right was doubtful, and that consequently respectable interests would suffer, since, if rejected by the courts, they could receive no part of the indemnities granted by the previous laws, the assembly, wishing to do justice to all, decided to make a further appropriation of 260,000,000 designed especially for the relief of persons who, during the war, had suffered material and direct losses resulting from the defensive measures adopted by the French military authorities.

"The law of the 28th of July, last, closes the series of relief measures which the assembly and the Government were led by a spirit of justice and a humane policy to adopt. After the passage of these three laws, it may be said that there is no kind of damage resulting from war for which relief has not been granted, if not in full, at least in a certain measure, and that without respect of persons. Foreigners, Germans as well as others, were allowed to receive a share of the indemnities granted, whether these had been appropriated to the reparation of losses resulting from the war, properly so called, or to that of losses caused by the insurrection of the commune.

"France has always taken the most liberal standpoint in granting indemnities after civil wars. Thus it was that a law of December 13, 1830, supplementary to the law of the 30th of August, preceding, placed the sum of 2,400,000 francs to the credit of the government for the purpose of indemnifying the sufferers by the July revolution. Another law, of December 24, 1851, appropriated 5,600,000 francs to the relief of the persons who had suffered damages to their property in consequence of the revolution of February, and the revolution of June, 1848. In all these cases, foreigners, as well as French citizens, were permitted to enjoy the benefits of the measures of relief which were adopted."

The rule announced by the Court of Claims can not be defended as a matter of justice; it overlooks the fact that the loss suffered by the individual is not by his own

fault but on account of the nation. It is a survival of the ancient harshness of war and will disappear with the extension of the now recognized principle that war is national and not individual.

But the principle is totally inapplicable to the present case. The action here is against the Indian tribes for breach of their treaty stipulations, arising out of their acts: it is not primarily a claim against the United States. Payment, by the 6th section of the act, is to be out of the Indian funds; if there are no Indian funds the payment is to be charged up against the Indians and to remain a charge against them for ultimate satisfaction.

It is not unusual for the successful party to a war to exact indemnity from the defeated nation for the cost and damages of the war. This may be both a cash indemnity and a cession of land as was exacted of France by Prussia in 1871, and of China by Japan in 1895, or a cession of territory, as exacted by the United States of Mexico (9 Stat. L., 922), or a cash indemnity alone.

In the treaty of August 9, 1814, with the Creeks (7 Stat. L., 120).

"The United States demand an equivalent for all expenses incurred in prosecuting the war to its termination, by a cession of all the territory belonging to the Creek nation within the territories of the United States, lying west, south and south-eastwardly, of a line to be run," etc.

In the treaty with the Blackfeet of October 17, 1855, Art. XII (11 Stat. L., 657, 659, *post*, p. 101), the Indians expressly agree that for violation of any treaty obligation, their annuities may be withheld. In the treaty of March 21, 1866, with the Seminoles (14 Stat. L., 755), it

is recited that by a treaty with the so-called confederate states, the Indians "incurred the forfeiture of all lands and other property held by a grant or gift of the United States." A similar recital occurs in the treaty with the Creeks of June 14, 1866 (14 Stat. L., 785).

The principle is thus recognized that tribal funds are to answer for tribal wrong-doing. Under the acts of 1885 and 1891, this indemnity is measured by the damages inflicted by the Indians upon the property of citizens resulting from their hostile acts. It would, indeed, be remarkable to permit the treaty breaking Indians to receive their annuities continuously and leave the wronged settlers without redress.

The United States appears only as the guarantor of the judgments rendered against the Indians. The guarantee by the United States is based not upon the ordinary conditions of war, but upon the peculiar political relations of the Indians and the United States. The Indians being under the care and control of the United States, interference with them by States or individuals is forbidden. In thus assuming charge over them, the United States becomes responsible for their acts. This was the ground upon which this act was urged by its advocates. See Hailey Report, H. R. Rep. 3117, 49th Cong., 1st Sess., pp. 4, 5; Hermann Report, H. R. Rep. 1079, 51st Cong., 1st Sess., pp. 2, 3, and letter of Commissioner of Indian Affairs contained therein, p. 5. If the Indians are liable, the United States assumes the responsibility of guaranteeing the judgment to the citizen and undertakes to settle the account with the Indians at a suitable time. The argument of the Court of Claims against the liability of the Indians, based on rules of international law, is wholly inapplicable because the relations between the United States and the Indians are not those of independent and equal powers.

IV. ACTION CONSEQUENT UPON JURISDICTION.

If the jurisdiction of the Court of Claims over this case is established, what defenses can be interposed upon the merits of the claim? The answer must be sought in the act of 1891 itself. Its structure is different from that of other acts granting jurisdiction to the Court of Claims.

The Tucker act of March 3, 1887 (1 Supp. R. S., 559; 24 Stat. L., 505), for instance, gives a wide jurisdiction, but numerous defenses, both of law and fact, may be urged after jurisdiction is established. The duties of the court under that act when jurisdiction is established are not rigidly prescribed; they are left to inference from common, local and statute law. The act of 1891 likewise might have been framed to give jurisdiction to the court of all Indian depredation claims and then to authorize judgment in those cases alone where certain conditions exist, such as amity, allowance or treaty obligation. But a different form was followed. The classes of jurisdiction are limited with care; the court can have jurisdiction only by finding certain conditions. When jurisdiction exists, by reason of the requisite conditions, the duty of the court is to proceed in accordance with the provisions found in other parts of the act. The duties of the claimant are defined in Section 3; those of the defendants in Section 4. Rules of evidence are prescribed in Sections 4 and 5. The last part of Section 5 fixes the duties of the court in cases of which it has jurisdiction. This is as follows:

"That the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified."

Under Section 1, the court passes upon the preliminary questions of law before considering the case on its merits; under Section 5, it finds the merits of the claim and renders judgment.

The defendants have urged that if jurisdiction is acquired, the amity of the Indians then becomes a test of liability and a defense on the merits. The majority of the court below (three judges) in holding that no jurisdiction is acquired without amity, disposed of this contention (Leighton *v.* United States, 29 C. Cls., 319, 320). The minority (two judges), concurring in the decision, held that the court has jurisdiction of claims, whether arising in war or in amity, but that amity is a defense upon the merits (Love *v.* United States, 29 C. Cls., 332, 344).

The position taken by the minority in the construction of the statute is, therefore, this:

Congress gives jurisdiction to the Court of Claims in two classes of cases—(1) claims arising in amity; (2) claims arising under treaty obligations. Judgment is to be rendered against all of the second class of cases, unless they were also included in the first class.

If this position were expressed in the statute, then the first section would provide that the Court of Claims shall have jurisdiction in claims of the following classes: (1) claims arising in amity; (2) claims arising under treaty obligation: *Provided*, That no judgment shall be rendered for the claimant in any of the latter class of cases, unless it is also within the former class.

Reasoning resulting in such a conclusion can not be sound. Congress never would have passed a law in such terms. A meaning which Congress would not have expressed should not be implied. The act expressly provides for the consideration of amity as one of the jurisdictional questions. When then disposed of, it is not possible to revive it as an implied defense on the merits.

The true reason for the inability of the Court of Claims to agree upon the grounds for their conclusion is that the conclusion is erroneous. The statute itself furnishes the guide both to its jurisdiction and to the duties of the court when jurisdiction is established. By adhering to the statute itself, contradiction and difficulty can be avoided.

V. AMITY ACTUALLY EXISTED.

The object of this argument has so far been to show that outside the jurisdiction in claims arising in amity, the act of March 3, 1891, has conferred a sufficiently broad jurisdiction upon the Court of Claims to include this case. The question now arises whether this claim originated while the tribe was "in amity." The answer to that question depends largely upon the true definition of these words.

Judicial Definition of Amity.

In this argument the definition given by the Court of Claims has been assumed correct. In Marks *v.* United States (28 C. Cls., 168) it is said:

"The court, taking the word in its ordinary and common signification must conclude that it intends to indicate a state of peace and good fellowship between the Indians upon the one side and the United States upon the other."

In Leighton *v.* United States (29 C. Cls., 326) the court said:

"While the words 'band, tribe or nation in amity with the United States' mean a condition of peace and friendship between such band, tribe or nation and the United States, and the absence of such condition implies a want of amity, yet it is not always an easy matter to determine

what state of facts must exist to constitute such condition.

"Ill feeling may exist between such tribe and the citizens in a given locality with or without just cause on the part of such tribe, but unless such tribe resort to a wanton destruction of life and property, the condition of amity on the part of such tribe toward the United States will not thereby be changed; nor will a mere raid by such tribe on the citizens for the purpose of plunder, evidenced by their acts, constitute a condition of hostilities toward the United States unless the troops of the United States are called into requisition to suppress such raid and the tribe resists with arms. (*Alire's Case*, 1 C. Cls. R., 233–238.)

"Where a *small* party of Indians or a *minority* of a tribe *without the consent of such tribe*, engage in such a raid, though they encounter United States troops and engage them in battle, the condition of amity between such *tribe* and the United States will not thereby be changed.

"In other words, the amity of the band, tribe, or nation with the United States is alone involved under the act of 1891, and that condition may exist, though a small party therefrom, as in the case at bar, raid on the citizens and commit depredations."

Amity, how Terminated.

In the case of Marks, on hearing before this court with this case, learned counsel have argued with great force for a far more widely extended meaning for these words than given by the Court of Claims, and particularly that "amity" continues until the United States formally recognizes a state of war. That argument is adopted in its application to this case; it is so full and ample that nothing more is needed here than to show its application.

The treaty of October 28, 1865 (*ante*, p. 104), with the Ogallalla Sioux was recognized by the United States as continuously in force until superseded by the treaty of April 29, 1868 (15 Stat. L., 635), annual appropriations being made under it, as follows:

Act of July 26, 1866, for year ending June 30, 1867, $10,000, 14 Stat. L., 274.

Act of March 2, 1867, for year ending June 30, 1868, $10,000, 14 Stat. L., 508.

Act of July 27, 1868, for year ending June 30, 1869, $10,000, 15 Stat. L., 216.

As the political department of the United States never treated the Indians as out of amity, it is not possible now for the judicial department to make a different declaration.

War did not Exist.

The claimant further contends that "amity," as defined above by the Court of Claims, actually existed at the date of this depredation. The finding of the Court of Claims on that subject (See Record, page 3) is as follows:

"At the time of the loss of said property the Ogallalla band of the Sioux tribe of Indians was in separate treaty relations with the United States under treaty dated October 28, 1865, proclaimed March 17, 1866 (14 Stat. L., 747), and were receiving annuities thereunder. The said Ogallalla band of Sioux Indians, under its principal chief, Red Cloud, was at the time of said depredation in armed hostility against the United States in resisting the military authorities in the opening of a military road and the establishment thereon of military posts and maintaining the same along what was known as the 'Boazman road,' extending from Fort Laramie, in Wyoming, to Fort Smith, in Montana. The relations of said band of Sioux Indians to the United States at that time will further appear from the following public documents, of which the court takes judicial notice, viz: Report of the Secretary of the Interior for 1866–1867 and 1867–1868, including the report of the peace commission therein at page 501; report of the Commissioner of Indian Affairs for 1865–1866 and 1866–1867; report of the Secretary of War for 1867–1868; Senate Executive document, No. 13, 40th Congress, 1st session; Senate Exec-

utive document, No. 33, 50th Congress, 1st session, and also History of Massacre of the Mountains, by J. P. Dunn, Jr., M.S., LL.B., pp. 477–509.

"From these facts the court finds the ultimate fact, so far as it is a question of fact, that the Ogallalla band of the Sioux tribe of Indians was not in amity with the United States at the time of the depredation hereinbefore found."

Under the well-established practice of this court (United States *v.* Pugh, 99 U. S., 270) the appellant is at liberty to dispute the ultimate fact and to say to this court that the primary facts found by the court justify a different ultimate conclusion of fact. The primary facts are the civil and military acts and opinions set forth in the reports referred to in the finding.

The conditions existing prior to this depredation are referred to in brief in the finding just quoted, and are more fully stated in the opinion of the court in Leighton *v.* United States (29 C. Cls., pp. 326–330). In that case the court found (pp. 290, 291) that amity existed on June 30, 1866, and in another case of the same claimant (No. 821) on September 7, 1866. The same conditions detailed in the report of Col. H. B. Carrington, U. S. A. (Sen. Ex. Doc. 33, 50th Cong., 1st Sess.) continued for some months. On August 29, 1866, he thus characterizes their operations (p. 19):

"They are bent on robbery; they only fight when assured of personal security and remunerative stealings; they are divided among themselves."

During all this time, the army refrained from any offensive operations. The sole object was to build the forts and maintain the Montana route. The settled policy was to preserve the status of peace and not to engage in an Indian war.

No actual collision occurred between Indians and any force of United States troops, until a skirmish at Fort Phil. Kearney, on December 6, 1866, followed by the massacre of December 21, 1866, sometimes called the Fetterman massacre (Carrington's report, pp. 37–41). These collisions resulted from the pursuit of the Indians who had made depredations on the wood-train. The officers at the fort were anxious to fight, and, on the latter occasion, pursued the Indians contrary to the orders of Col. Carrington, with the result that they were cut off and over ninety men killed. It is reported (p. 40) that one of the officers who went out as a volunteer, being under orders to return to Fort Laramie, expressed his desire that before returning to Laramie he should kill at least one Indian. This, the only serious combat with the Indians, was against the immediate orders of the commanding officer and the whole general policy of the Government.

In a report made by one of the commissioners appointed to treat with the Indians (Sen. Ex. Doc. 13, 40th Cong., 1st Sess., p. 63), the operations by the Indians during the year are very concisely summarized:

"The numerous demonstrations and attacks made by Indians prior to the sixth of December, seemed to have been made for the sole purpose of capturing stock, picket posts, and small parties of soldiers who might venture beyond the cover of the garrison, and of annoying and checking the wood-train constantly drawing material for the new forts."

Col. Carrington's report ends with the year 1866. No such minute and detailed account of affairs in 1867 is accessible. One reason for this is doubtless the fact that the depredations were not serious and no military operations were undertaken. Gen. C. C. Augur, commanding the Department of the Platte, September 30, 1867, speaks

as follows of the conditions existing in 1867 (Report of Sec. of War, 1867, p. 58):

"As early as February the Indians commenced a system of attacks upon small parties along the Montana route, and, as the season advanced, extended them to all my lines, and have kept it up during the whole summer. This has constituted the Indian war in this department. It is more in the nature of disconnected raids for stealing animals and getting other plunder than a systematic and permanent war. The raiding parties have been small, and scattered along the various lines of communication in the department."

The adjoining Department of Dakota, including Dakota and Montana, was in command of Gen. Terry. His report (p. 49 of same) says:

"The Indians within Minnesota and upon its western border have been peaceable and friendly, and in not a single instance has any depredation been committed by them.

"In the district of southeast Dakota, with the single exception of an attack upon the herd of mules and horses at Fort Randall, a similar quiet has prevailed, and no movements of troops other than the necessary changes of station have taken place (p. 51.) * * *

"In the middle district affairs have generally been quiet (p. 52). * * *

"I found the country between the Red River and the Missouri River perfectly quiet, and, indeed, met no Indians whatever, hostile or friendly" (p. 52).

He refers to excitement in Montana and to the calling out of volunteers by the governor, and to great differences of opinion as to the necessity for such action, and says:

"It is a somewhat noteworthy fact that none of these troops had then met hostile Indians. My own conclusions were briefly as follows, viz.: Ever since the Terri-

tory of Montana was settled Indian depredations have occurred with more or less frequency; small parties pushing out into the Indian country have from time to time been attacked, and in some cases destroyed; occurrences of this kind have, however, during the present year been *less frequent* than they ordinarily have been; *nothing which has happened within the Territory during this spring and summer, in my judgment, justified the alarm which was felt.* * * * Using my best judgment upon the matter, I have failed to satisfy myself that it was necessary to call out the militia."

It thus appears that in Gen. Terry's Department, the conditions were much the same as in Gen. Augur's—disconnected raids but no general war. The Bozeman road was in both Departments.

General Sherman, whose reports of June 1, and October 1, 1867, printed in the report of the Secretary of War for that year (pp. 31, 65), are chiefly relied upon for proof of actual hostility, admits that the hostility was confined to but a fraction of the tribes. He says (p. 67):

"These roving tribes have no real chiefs, but they are a pure democracy. Each man does as he pleases, regardless of his so-called chief; and at this very moment, what we term their war parties are made up of every tribe—Sioux, Cheyennes, Camanches, and Kiowas—all fighting together in large or small bands. Their families are kept far away with the old and friendly chiefs, who disclaim the war with all its attendant consequences, but stand ready to celebrate the dance over the scalps brought in by their more valorous and venturesome young braves, and ready to enjoy their share of the stolen horses, mules, and plunder."

This agrees with General Augur's characterization of the events of the year 1867 as "disconnected raids." There was uncertainty and agitation, there were numerous depredations, there were raiding parties, and the military was kept on the alert, but there was no war.

Actual engagements between the army and the Ogallalla Sioux Indians did not occur. The appropriations for the Indians were regularly made and distributed to them. It seems idle to speak of a war where almost the only meetings between the parties were for the distribution of rations and annuities.

If any Indian war existed, it nowhere appears, in any of the papers referred to, that the Ogallalla Sioux tribe, as a tribe, was concerned in it. A band of Sioux of this tribe, under Red Cloud, one of its principal chiefs, was engaged in unfriendly acts; but it is stated positively by one of the authorities referred to in the finding that he was the chief of only one of three bands of the tribe, and it is nowhere shown that any more than a single band was engaged in the depredations occurring at this time. The Commissioner of Indian Affairs, on February 4, 1867 (Sen. Ex. Doc. 13, 40th Cong., 1st Sess., p. 9), says:

"Nevertheless, there is a band of Sioux Indians in this country, of the Ogallalla tribe, headed by a chief of the name of Red Cloud, that are badly disposed. This is the only band, so far as I am informed, that is hostile as a band, but I have no doubt that around him and under his banner are gathered all the badly disposed Indians of the country. They flock to his standard as individuals, not as tribes, and I think this band, with its adherents, should be severely chastised by the military."

The status of Red Cloud and his relation to the Ogallalla tribe is shown in "Massacres of the Mountains" (p. 481):

"The leader of the anti-cession party was Red Cloud (Mock-peah-lu-tah), who was at that time known only as the chief of the Bad Faces, one of the three bands into which the Ogallallas were divided."

It thus appears that, even if there were an actual Indian war, the Ogallalla Tribe was not concerned in it;

the depredations were committed merely by a minority of the tribe, under the very conditions which the Court of Claims concedes, in the opinion quoted (*ante*, p. 55), to be consistent with the amity of the tribe.

A careful perusal of all the official reports at this time shows a constant tendency of the military to exaggerate the warlike conditions. The official position of the responsible Federal authorities, both civil and military, was that no war existed. General Sherman himself (see Report of the Secretary of War, 1867, p. 65), although urgent in demanding active military operations, concedes that the official policy was against him:

"But instead of talking with the Indians who did the deed, I would have preferred to have followed the savages to their own country, and to have avenged the massacre in such a way that it would not have invited a repetition, but Congress, in its wisdom, with a full knowledge of all the facts, and all its connecting circumstances, has preferred to send out civil peace commissioners to confer with the perpetrators, and during such conference the military would not have been justified in adopting extreme measures."

If an Indian war existed in December, 1866, at the massacre at Fort Phil. Kearney, it is clear that it was over long before the date of this depredation, April 10, 1867. No engagements, we have seen, took place in the spring of 1867 between the Army and the Indians. Peace Commissioners were sent out early in 1867 to treat with the turbulent Indians, and on the twentieth of April, only ten days after the depredation in this case, they held a friendly conference with the representatives of the Ogallalla Sioux Tribe. (See Senate Ex. Doc. 13, 40th Cong., 1st Session, pp. 87, 88.) Their conferences during the next month (see pages 113–115 of the same Doc.) showed the Indians anxious for a settlement of all difficulties;

and in June, 1867, the Ogallalla Sioux came into Fort Laramie to settle all questions in dispute. Casual depredations occurred during the early part of 1867, and the general conditions were somewhat unsettled; but if war existed at any time, it was over long before the month of April. The single conflict, in December, 1866, does not constitute a continuous war for four months.

It is, therefore, insisted that the ultimate fact of want of amity found by the Court of Claims is not satisfactorily established by the primary facts relied upon and cited in the finding.

DOES AMITY MEAN TREATY?

Another ground exists for the claimant's position, that the Indians were in amity during this depredation. It was contended by the claimant in the court below that the words "in amity," in their historical significance, meant "in treaty relations," and that the construction finally adopted by the court holding them equivalent to "at peace," was not warranted by a careful study of these words as used throughout the history of our Indian regulations. It has already been seen that these words first appear in the statutes of the United States in the act of May 19, 1796, section 14 (Appendix A, p. 69). The term occurs at a still earlier period in the preamble to the ordinance of August 7, 1786, passed by Congress before the Constitution (American State Papers, Indian Affairs, Vol. 1, p. 14). That ordinance begins thus:

"Whereas, the safety and tranquility of the frontiers of the United States, do, in some measure, depend on the maintaining a good correspondence between their citizens and the several nations of Indians in amity with them."

The body of the ordinance is then taken up with provisions for Indian superintendents, trading and conventions, all applicable only to Indians in treaty relations.

The same words are used in the communication of the Secretary of War of March 13, 1816, heretofore quoted, (*ante*, p. 5). The use of these words in this ordinance, in the early statutes, and in this letter, indicate that they did not, at that time, refer to the peaceful condition of the Indians, but to their treaty relations. Indian tribes, with whom treaties had been made, were spoken of as tribes "in amity"; those with whom treaties had not been made, were not considered as "in amity."

In these early days, the Indians were not always inferior in power to the Federal Government. Treaties had been made with some tribes, but not with others. These had refused to acknowledge the white man as lawfully in the country. It was an object of primary importance to make friends of the Indians and the treaties in nearly every instance declared that friendship should exist. As a bond of peace, annuities were generally to be given by the United States. Appendix B (*post*, p. 84) contains references to these early treaties and to their stipulations both for friendship and annuities.

In order to assure peace with the Indians with whom treaties were made, Congress provided by act of May 19, 1796 (*post*, p. 69), that depredations by them upon citizens and depredations by citizens upon them should not be the subject of private dispute. The United States assumed the double responsibility of making payment for all unlawful acts on both sides.

It was not intended that the United States should answer for the depredations of the wild tribes not in amity; the responsibility was confined to those with whom treaty relations had been concluded. Nearly all of these had annuities from the United States and these annuities were made answerable for their depredations.

The treaties and the statute were parts of an entire system. The treaties uniformly provided for friendship

and generally for annuities and the tribes were then said to be "in amity." The statute preserved peace by destroying any motive for retaliation, either by or upon such tribes, but the offending nation answered for wrongdoers out of the annuities. Any construction varying from this leaves the system inharmonious.

This construction of these words has also the great merit of being entirely in harmony with the construction followed by the Interior Department under all acts authorizing the examination of Indian depredation claims, including that of 1885. It has already been seen that the distinction between war and peace was not observed in the Department, while, on the contrary, the treaty obligation was constantly and carefully inquired into. In Appendix F, official communications are printed which show this construction. In the Hermann Report (H. R. Rep. 1079, 51st Cong., 1st Sess., p. 5), a communication from the Commmisioner of Indian Affairs is quoted in which the words "in treaty relations" are used exactly equivalent to "in amity," as follows:

"All previous legislation upon this subject has limited the jurisdiction of the Government in the settlement of these claims, to the consideration of those resulting from depredations committed by Indians who, at the time were 'in treaty relations' with the United States."

By adopting a construction of the words "in amity" as equivalent to "in treaty relations," nearly all the difficulties which the Court of Claims has found in the construction of this statute will disappear and there will be substantially accord between the act of 1891 and the preceding legislation and departmental practice.

VI. CONCLUSION.

Claimant's Construction Not Unjust to the Indians.

Some fears have been expressed that Section 6 of the act of March 3, 1891, requiring the Indian funds to answer for depredations, might work great hardships to the Indians. This can hardly affect the judicial consideration of the act. It might properly have appealed to Congress; but the legislature having acted, the courts must enforce the statute in its true intent. It is gratifying to know that the actual enforcement of the act has been with every consideration for the rights of Indians. About three quarters of a million dollars has been paid on account of judgments under this act, and all appropriations have contained a provision (see Appendix A. *post*, p. 83.), that the Secretary of the Interior should determine whether the money should be taken from the Indian funds, "having due regard to the educational or other requirements of the tribes affected." Only a few thousand dollars have been paid from Indian money and these from overflowing tribal funds.

Claimant's Construction Literal, Consistent and Continuous.

The construction for which the claimant contends, has three conspicuous merits, it is literal, consistent and continuous.

It follows the terms of the act; it seeks no outside aid when the act itself is plain; it regards the act as its own best interpreter (*ante*, pp. 14–17, 22–23).

It renders all parts of the act entirely consistent. Each part receives its natural interpretation and together they form a consistent whole (*ante*, pp. 40).

It preserves a continuity of decision between the Interior Department and the court. It regards the act of 1891 as a development of the act of 1885 and of the Departmental action under it; it considers that Congress acted with knowledge of the practice under the earlier statute and desired a continuity of construction (*ante*, pp. 36–40).

The construction adopted by the court interprets the act by foreign elements, renders its provisions inconsistent and declares the long continued action of the Interior Department radically erroneous.

Attention is asked to the brief of associate counsel filed with this.

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APPENDIX A.

General Legislation on Claims for Depredations Committed by Indians.

I.—*Act of May 19, 1796, sec. 14 (1 Stat. L., 472).*

"*And be it further enacted*, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence, or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent, or other person authorized, as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken as shall be proper to obtain satisfaction for the injury: And, in the meantime, in respect to the property so taken, stolen or destroyed, the United States guarantee to the party injured an eventual indemnification; *Provided always*, That if such injured party, his representative, attorney, or agent, shall in any way violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States for such indemnifica-

tion: *And provided also,* That nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any State or district, of any Indian having so offended: *And provided further,* That it shall be lawful for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen or destroyed, by any such Indian out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong."

II.—*Act of March 3, 1799, sec. 14 (1 Stat. L., 747).*

"*And be it further enacted,* That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence, or outrage upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong for satisfaction, and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent or other person authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken as shall be proper to obtain satisfaction for the injury: and in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured, an eventual indemnification: *Provided always,* That if such injured party, his representative, attorney, or agent, shall, in any

way, violate any of the provisions of this act by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States for such indemnification: *And provided also*, That nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any State or district, of any Indian having so offended: *And provided further*, That it shall be lawful for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen or destroyed by any such Indian out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong."

III.—*Act of March 30, 1802, sec. 14 (2 Stat. L., 143).*

"*And be it further enacted*, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the Territorial districts of the United States, or shall commit any murder, violence, or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, then it shall be the duty of such superintendent or other person, authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken as shall be proper to obtain satisfaction for the injury: and in the meantime, in respect to the prop-

erty so taken, stolen, or destroyed, the United States guarantee to the party injured an eventual indemnification: *Provided always*, That if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States for such indemnification: *And provided, also*, That nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: *And provided further*, That it shall be lawful for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen or destroyed by any such Indian, out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong.

IV.—*Act of June 30, 1834, sec. 17 (4 Stat. L., 731).*

"*And be it further enacted*, That if any Indian or Indians belonging to any tribe in amity with the United States shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and, in the mean time, in respect to the property

so taken, stolen, or destroyed, the United States guarantee to the party so injured an eventual indemnification: *Provided*, That, if such injured party, his representative, attorney, or agent, shall in any way violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided, also*, That unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom and paid to the party injured; and if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the Treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended."

V.—*Act of February 28, 1859, sec. 8* (*11 Stat. L., 401.*)

"*And be it further enacted*, That so much of the act entitled 'An act to regulate trade and intercourse with the Indian tribes, and preserve peace on the frontiers,' approved June thirtieth, eighteen hundred and thirty-four, as provides that the United States shall make indemnification out of the Treasury for property taken or destroyed in certain cases, by Indians trespassing on white men as described in the said act, be, and the same is hereby, repealed: *Provided, however*, That nothing herein contained shall be so construed as to impair or destroy the obligation of the Indians to make indemnification out of the annuities as prescribed in said act."

VI.—*Joint resolution of June 25, 1860* (*12 Stat. L., 120*).

"That the repeal *of* [by] the eighth section of the act of Congress, approved the twenty-eighth day of February, eighteen hundred and fifty-nine, of so much of the act of Congress entitled 'An act to regulate trade and intercourse with Indian tribes, and to preserve peace on the frontiers,' approved June thirtieth, eighteen hun-

dred and thirty-four, as provides that the United States shall make indemnification out of the Treasury for property taken or destroyed in certain cases by Indians trespassing on white men, as described in said act, shall not be construed to destroy or impair any right to indemnity which existed at the date of said repeal."

VII.—*Act of July 15, 1870, sec. 4 (16 Stat. L., 360). See Sec. 2098, Revised Statutes, infra.*

"*And be it further enacted,* That no part of the moneys appropriated by this act, or which may hereafter be appropriated in any general act or deficiency bill making appropriations for the current and contingent expenses of the Indian department, to pay annuities due to or to be used and expended for the care and benefit of any tribe or tribes of Indians named herein, shall be applied to the payment of any claim for depredations that may have been or may be committed by such tribe or tribes, or any member or members thereof; and no claims for Indian depredations shall hereafter be paid until Congress shall make special appropriation therefor; and all acts and parts of acts inconsistent herewith are hereby repealed."

VIII.—*Act of May 29, 1872, sec. 7 (17 Stat. L., 190). See Secs. 445 and 466, Revised Statutes, infra.*

"That it shall be the duty of the Secretary of the Interior to *to* prepare and cause to be published such rules and regulations as he may deem necessary or proper, prescribing the manner of presenting claims arising under existing laws or treaty stipulations, for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims; he shall carefully investigate all such claims as may be presented, subject to the rules and regulations prepared by him, and report to Congress, at each session thereof, the nature, character, and amount of such claims, whether allowed by him or not, and the evidence upon which his action was based: *Provided,* That no payment on account of said claims shall be made without a specific appropriation therefor by Congress."

IX.—*Section 445, Revised Statutes.*

"The Secretary of the Interior shall make annual reports to Congress as follows:

"First. A report showing the nature, character and amount of all claims presented to him during the preceding year under the laws or treaty stipulations for compensation for depredations committed by Indians, whether allowed by him or not, and the evidence upon which his action was based." * * * *

X.—*Section 466, Revised Statutes.*

"The Secretary of the Interior shall prepare and cause to be published such regulations as he may deem proper, prescribing the manner of presenting claims arising under laws or treaty stipulations, for compensation for depredations committed by the Indians, and the degree and character of the evidence necessary to support such claims; he shall carefully investigate all such claims as may be presented, subject to the regulations prepared by him; and no payment on account of any such claims shall be made without a specific appropriation therefor by Congress."

XI.—*Section 2098, Revised Statutes.*

"No part of the moneys which may be appropriated in any general act or deficiency bill making appropriations for the current and contingent expenses incurred in Indian affairs, to pay annuities due or to be used and expended for the care and benefit of any tribe or tribes of Indians, shall be applied to the payment of any claim for depredations that may have been or may be committed by such tribe or tribes, or any member or members thereof. No claims for Indian depredations shall be paid until Congress shall make special appropriation therefor."

XII.—*Section 2156, Revised Statutes.*

"If any Indian, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within

such country, or shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which such Indian shall belong for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time not exceeding twelve months, such superintendent, agent, or sub-agent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury."

XIII.—*Act of March 3, 1885 (23 Stat. L., 376).*

"INDIAN DEPREDATION CLAIMS.

"For the investigation of certain Indian depredation claims, ten thousand dollars; and in expending said sum the Secretary of the Interior shall cause a complete list of all claims heretofore filed in the Interior Department and which have been approved in whole or in part and now remain unpaid, and also all such claims as are pending but not yet examined, on behalf of citizens of the United States on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States, including the name and address of the claimants, the date of the alleged depredations, by what tribe committed, the date of examination and approval, with a reference to the date and clause of the treaty creating the obligation for payment, to be made and presented to Congress at its next regular session; and the Secretary is authorized and empowered, before making such report, to cause such additional investigation to be made and such further testimony to be taken as he may deem necessary to enable him to determine the kind and value of all property

damaged or destroyed by reason of the depredations aforesaid, and by what tribe such depredations were committed; and his report shall include his determination upon each claim, together with the names and residences of witnesses and the testimony of each, and also what funds are now existing or to be derived by reason of treaty or other obligation out of which the same should be paid."

XIV.—*Act of May 15, 1886 (24 Stat. L., 44).*

"Indian depredation claims: For continuing the investigation and examination of certain Indian depredation claims originally authorized, and in the manner therein provided for, by the Indian appropriation act approved March third, eighteen hundred and eighty-five, twenty thousand dollars; and the examination and report shall include claims, if any, barred by statute, such fact to be stated in the report; and all claims whose examination shall be completed by January first, eighteen hundred and eighty-seven, shall then be reported to Congress, with the opinions and conclusions of the Commissioner of Indian Affairs and the Secretary of the Interior upon all material facts, and all the evidence and papers pertaining thereto."

By subsequent Indian appropriation acts, provisions similar to these are made (see acts of March 2, 1887, 24 Stat. L., 464; June 29, 1888, 25 Stat, L., 234; March 2, 1889, 25 Stat. L., 998; August 19, 1890, 25 Stat. L., 356; March 3, 1891, 26 Stat. L., 1009).

XV.—*Act of March 3, 1891 (26 Stat. L., 851; 1 Supp. R. S., 913).*

"An act to provide for the adjudication and payment of claims arising from Indian depredations.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner pro-

vided in this act, all claims of the following classes, namely:

"First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

"Second, Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject however, to the limitations hereinafter provided.

"Third. All just offsets and counter claims to any claim of either of the preceding classes which may be before such court for determination.

"SECTION 2. That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government: *Provided*, That no claim accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the court unless the claim shall be allowed or has been or is pending, prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, sub-agent or commissioner, authorized under any act of Congress to inquire into such claims; but no case shall be considered pending unless evidence has been presented therein: *And provided further*, That all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as herein after provided, within three years after the passage hereof or shall be thereafter forever barred: *And provided further*, That no suit or proceeding shall be allowed under this

act for any depredation which shall be committed after the passage thereof.

"SECTION 3. That all claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be, the property lost or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved. The petition shall be verified by the affidavit of the claimant, his agent, administrator, or attorney, and shall be filed with the clerk of the said court. It shall set forth the full name and residence of the claimant, the damages sought to be recovered, praying the court for a judgment upon the facts and the law.

"SECTION 4. The service of the petition shall be made upon the Attorney-General of the United States in such manner as may be provided by the rules or orders of said court. It shall be the duty of the Attorney-General of the United States to appear and defend the interests of the Government and of the Indians in the suit, and within sixty days after the service of the petition upon him, unless the time shall be extended by order of the court made in the case, to file a plea, answer or demurrer on the part of the Government and the Indians, and to file a notice of any counter claim, set-off, claim of damages, demand, or defense whatsoever of the Government or of the Indians in the premises: *Provided*, That should the Attorney-General neglect or refuse to file the plea, answer, demurrer, or defense as required, the claimant may proceed with the case under such rules as the court may adopt in the premises; but the claimant shall not have judgment for his claim, or for any part thereof, unless he shall establish the same by proof satisfactory to the court; *Provided*, That any Indian or Indians interested in the proceedings may appear and defend, by an attorney employed by such Indian or Indians with the approval of the Commissioner of Indian Affairs, if he or they shall choose so to do.

"In considering the merits of claims presented to the

court, any testimony, affidavits, reports of special agents or other officers, and such other papers as are now on file in the departments or in the courts, relating to any such claims, shall be considered by the court as competent evidence and such weight given thereto as in its judgment is right and proper: *Provided*, That all unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and subsequent Indian appropriation acts, shall have priority of consideration by such court, and judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses and the documentary evidence, including reports of Department agents therein, may be read as depositions and proofs: *Provided*, That the party electing to reopen the case shall assume the burden of proof.

"SECTION 5. That the said court shall make rules and regulations for taking testimony in the causes herein provided for, by deposition or otherwise, and such testimony shall be taken in the county where the witness resides, when the same can be conveniently done, and no person shall be excluded as a witness because he is party to or interested in said suit, and any claimant or party in interest may be examined as a witness on the part of the Government; that the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified.

"SEC. 6. That the amount of any judgment so rendered

against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence and education; and, fourth, if no such annuity, funds, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

"SEC. 7. That all judgments of said court shall be a final determination of the causes decided and of the rights and obligations of the parties thereto, and shall not thereafter be questioned unless a new trial or rehearing shall be granted by said court, or the judgment reversed or modified upon appeal as hereafter provided.

"SEC. 8. That immediately after the beginning of each session of Congress the Attorney-General of the United States shall transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this act in favor of claimants and against the United States, and not paid as hereinbefore provided, which shall thereupon be appropriated for in the proper appropriation bill.

"SEC. 9. That all sales, transfers, or assignments of any such claims heretofore or hereafter made, except such as have occurred in the due administration of decedents' estates, and all contracts heretofore made for fees and allowances to claimants' attorneys, are hereby declared void, and all warants issued by the Secretary of the Treasury, in payment of such judgments, shall be made payable and delivered only to the claimant or his lawful heirs, ex-

ecutors or administrators or transferee under administrative proceedings, except so much thereof as shall be allowed the claimant's attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys, and the allowances to the claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case and entered of record as part of the findings thereof; but in no case shall the allowance exceed fifteen per cent of the judgment recovered, except in case of claims of less amount than five hundred dollars, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent of such judgment shall be allowed by the court.

"SEC. 10. That the claimant, or the United States, or the tribe of Indians, or other party thereto interested in any proceeding brought under the provisions of this act, shall have the same rights of appeal as are or may be reserved in the Statutes of the United States in other cases, and upon the conditions and limitations therein contained. The mode of procedure in claiming and perfecting an appeal shall conform, in all respects, as near as may be, to the statutes and rules of court governing appeals in other cases.

"SEC. 11. That all papers, reports, evidence, records and proceedings now on file or of record in any of the departments, or the office of the Secretary of the Senate, or the office of the Clerk of the House of Representatives, or certified copies of the same, relating to any claims authorized to be prosecuted under this act shall be furnished to the court upon its order, or at the request of the Attorney-General.

"SEC. 12. To facilitate the speedy disposition of the cases herein provided for in said Court of Claims, there shall be appointed, in the manner prescribed by law for the appointment of Assistant Attorney-Generals, one additional Assistant Attorney-General of the United States, who shall receive a salary of twenty-five hundred dollars per annum.

"SEC. 13. That the investigation and examination, under the provisions of the acts of Congress heretofore in

force, of Indian depredation claims, shall cease upon the taking effect of this act, and the unexpended balance of the appropriation therefor shall be covered into the Treasury, except so much thereof as may be necessary for disposing of the unfinished business pertaining to the claims now under investigation in the Interior Department, pending the transfer of said claims and business to the Court or courts herein provided for, and for making such transfers and a record of the same, and for the proper care and custody of the papers and records relating thereto."

VI.—*Act of July 28, 1892, Sec. 5 (27 Stat. L., 319).*

"For payment of judgments of the Court of Claims in Indian depredation cases, four hundred and seventy-eight thousand two hundred and fifty-two dollars and sixty-two cents, or so much thereof as may be necessary to pay and discharge such judgments as have rendered against the United States, after the deductions required to be made under the provisions of section six of the act approved March third, eighteen hundred and ninety-one, entitled 'An act to provide for the adjustment and payment of claims arising from Indian depredations,' shall have been ascertained and duly certified by the Secretary of the Interior to the Secretary of the Treasury, which certification shall be made as soon as practicable after the passage of this act, and such deductions shall be made according to the discretion of the Secretary of the Interior, having due regard to the educational and other necessary requirements of the tribe or tribes affected, and the amounts paid shall be reimbursed to the United States at such times, and in such proportions, as the Secretary of the Interior may decide to be for the interests of the Indian service."

Similar provision is made in the later appropriation acts of August 23, 1894, and March 3, 1895, 28 Stat. L., 476, 869.

APPENDIX B.

INDIAN TREATIES, 1778–1870.

OBLIGATIONS BY THE INDIANS IN RELATION TO DEPREDATIONS.

NOTE.—In connection with the earlier treaties from 1778 to 1808, reference is made to the annuities or other benefits provided to show the association of treaties and annuities at that time. See brief, p. 65.

Treaty of September 17, 1778, with Delawares, 7 Stat. L., 13.

"That a perpetual peace and friendship shall from henceforth take place, and subsist between the contracting parties aforesaid, through all succeeding generations." Art. II.

Agent to conduct trade. Art. V.

Treaty of October 22, 1784, with Six Nations, 7 Stat. L., 15.

"The United States of America give peace to the Senecas, Mohawks, Onondagas, and Cayugas, and receive them into their protection." Preamble.

Goods to be distributed. Art. IV.

Treaty of January 21, 1785, with Wiandots and others, 7 Stat. L., 16.

"The said Indian nations do acknowledge themselves and all their tribes to be under the protection of the United States and of no other sovereign whosoever." Art. II.

Goods to be distributed. Art. X.

Treaty of November 28, 1785, with the Cherokees, 7 Stat. L., 18.

"The said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever." Art. III.

"For the benefit and comfort of the Indians, and for the prevention of injuries or oppression on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper." Art. IX.

"The hatchet shall be forever buried, and the peace given by the United States, and friendship re-established between the said States on one part, and all the Cherokees on the other, shall be universal; and the contracting parties shall use their utmost endeavors to maintain the peace given as aforesaid, and friendship re-established." Art. XIII.

Treaty of January 3, 1786, with the Choctaws, and of January 10, 1786, with the Chickasaws, 7 Stat. L., 21, 24.

Same provisions.

Treaty of January 31, 1786, with the Shawanoes, 7 Stat. L. 26,

The Shawanoe nation acknowledge the United States to be the sole and absolute sovereigns of all the territory ceded by treaty with Great Britain, of January 15, 1784. Art. II.

"If any Indian or Indians of the Shawanoe nation, or any other Indian or Indians residing in their towns, shall commit murder or robbery on, or do any injury to the citizens of the United States, or any of them, that nation shall deliver such offender or offenders to the officer commanding the nearest post of the United States, to be punished according to the ordinances of Congress." Art. III.

"The United States do grant peace to the Shawanoe nation, and do receive them into their friendship and protection." Art. V.

Treaty of January 9, 1789 with the Wiandots and others, 7 Stat. L., 28.

Goods to the value of $6,000 delivered. Art. II.

"It is agreed that if any Indian or Indians of the nations before mentioned, shall commit a murder or robbery on any of the citizens of the United States, the nation or tribe to which the offender belongs, on complaint being made, shall deliver up the person or persons complained of, at the nearest post of the United States; to the end, that he or they may be tried, and, if found guilty, punished according to the laws established in the Territory of the United States northwest of the river Ohio, for the punishment of such offenses, if the same shall have been committed within the said Territory; or according to the laws of the State where the offense may have been com-

mitted, if the same has happened in any of the United States." Art. V.

"And whereas the practice of stealing horses has prevailed very much, to the great disquiet of the citizens of the United States, and if persisted in, can not fail to involve both the United States of America and the Indians in endless animosity, it is agreed that it shall be put an entire stop to on both sides; nevertheless, should some individuals, in defiance of this agreement, and of the laws provided against such offenses, continue to make depredations of that nature, the person convicted thereof shall be punished with the utmost severity the laws of the respective States, or Territory of the United States northwest of the Ohio, where the offense may have been committed, will admit of. And all horses so stolen, either by the Indians from the citizens or subjects of the United States, or by the citizens or subjects of the United States from any of the Indian nations, may be reclaimed, into whose possession soever they may have passed, and, upon due proof, shall be restored; any sales in market overt, notwithstanding." Art. VI.

See similar provisions in another treaty, *post*, p. 95.

The Indians acknowledge themselves to be under the protection of the United States, and no other power whatever. Art. XIII.

Treaty of January 9, 1789, with Six Nations, 7 Stat. L., 33.

Goods to the value of $3,000 delivered. Art. I.

The United States of America renew and confirm the peace and friendship entered into by former treaty. Art. IV.

"Should a robbery or murder be committed by an Indian or Indians of the Six Nations, upon the citizens or subjects of the United States, or by the citizens or subjects of the United States, or any of them, upon any of the Indians of the said nations, the parties accused of the same shall be tried, and if found guilty, be punished according to the laws of the State or of the Territory of the United States, as the case may be, where the same was committed. And should any horses be stolen, either by the Indians of the said Nations from the citizens or

subjects of the United States, or any of them, or by any of the said citizens or subjects from any of the said Indians, they may be reclaimed into whose possession soever they may have come; and upon due proof, shall be restored, any sale in open market notwithstanding; and the persons convicted shall be punished with the utmost severity the laws will admit. And the said Nations engage to deliver the persons that may be accused, of their Nations, of either of the before mentioned crimes, at the nearest post of the United States, if the crime was committed within the territory of the United States, or to the civil authority of the State, if it shall have happened within any of the United States." Separate Art.

Treaty of August 7, 1790, with the Creeks, 7 Stat. L., 35.

"Perpetual peace and friendship between all the citizens of the United States of America, and all the individuals, towns and tribes" of the Creek Nation. Art. I.

The Creek Nation acknowledges itself to be under the protection of the United States of America, and of no other sovereign whosoever. Art. II.

"Certain valuable Indian goods" to be delivered, and $1,500 to be paid annually. Art. IV.

If any Creek Indian or Indians shall commit a robbery or murder, or other capital crime, on any of the citizens or inhabitants of the United States, the Creek Nation shall be bound to deliver him or them up, to be punished according to the laws of the United States. Art. VIII.

"In cases of violence on the persons or property of the individuals of either party, neither retaliation nor reprisal shall be committed by the other, until satisfaction shall have been demanded of the party, of which the aggressor is, and shall have been refused." Art. X.

The United States guarantees to furnish domestic animals and implements of husbandry. Art. XII.

Treaty of July 2, 1791, with the Cherokees, 7 Stat. L., 39.

Similar provisions.

Treaty of June 26, 1794, with the Cherokees, 7 Stat. L., 43.

Previous treaty declared binding. Art. I.

Goods to the amount of $5,000 to be furnished annually. Art. III.

Treaty of November 11, 1794, with the Six Nations, 7 Stat. L., 44.

"Peace and friendship are hereby firmly established, and shall be perpetual." Art. I.

Goods of the value of $10,000 delivered, and $4,500 to be expended for the benefit of the Indians annually. Art. VI.

"Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken: until the legislature (or great council) of the United States shall make other equitable provision for the purpose." Art. VII.

Treaty of Peace of August 3, 1795, with Wyandots and others, 7 Stat. L., 49.

"Peace is hereby established, and shall be perpetual." Art. I.

Goods of the value of $20,000 delivered and of the value of $9,500 to be delivered annually. Art. IV.

"And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever." Art. V.

A provision similar to Article VII of the treaty of November 11, 1794, with the Six Nations, *supra*, is contained in Article IX.

Treaty of June 29, 1796, with the Creeks, 7 Stat. L., 56.

"The parties being desirous of establishing permanent peace and friendship." Preamble.

The treaty of August 7, 1790, is confirmed. Art. I.

Goods to the value of $6,000 given, and blacksmith's tools to be sent. Art. VIII.

Treaty of October 2, 1798, with the Cherokees, 7 Stat. L., 62.

"The peace and friendship subsisting between the United States and the Cherokee people, are hereby renewed, continued, and declared perpetual." Art. I.

Goods to the amount of $5,000 to be delivered and to the amount of $1,000 to be delivered annually. Art. VI.

"It is mutually agreed between the parties, that horses stolen and not returned within ninety days, shall be paid for at the rate of sixty dollars each; if stolen by a white man, citizen of the United States, the Indian proprietor shall be paid in cash; and if stolen by an Indian from a citizen, to be deducted as expressed in the fourth article of the treaty of Philadelphia." Art. IX.

Treaty of December 17, 1801, with the Chactaws, 7 Stat. L., 66.

"It is agreed by the parties to these presents respectively, that the Chactaw Nation, or such part of it as may reside within the limits of the United States, shall be and continue under the care and protection of the said States; and that the mutual confidence and friendship which are hereby acknowledged to subsist between the contracting parties shall be maintained and perpetuated." Art. I.

Goods of the value of $2,000 and blacksmith's tools to be given. Art. V.

Treaty of November 3, 1804, with the Sacs and Foxes, 7 Stat. L., 84.

"The United States receive the united Sac and Fox tribe into their friendship and protection, and the said tribes agree to consider themselves under the protection of the United States, and of no other power whatsoever." Art. I.

Goods of the value of $1,000 to be delivered annually. Art. III.

"Lest the friendship which is now established between the United States and the said Indian tribes should be interrupted by the misconduct of individuals, it is hereby agreed that for injuries done by individuals no private revenge or retaliation shall take place, but, instead thereof, complaints shall be made by the party injured to the other—by the said tribes or either of them to the superintendant of Indian Affairs or one of his deputies, and by the superintendant or other person appointed by the

President, to the chiefs of the said tribes. And it shall be the duty of the said chiefs upon complaint being made as aforesaid to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the State or Territory where the offence may have been committed. * * * And it is further agreed, that the chiefs of the said tribes shall, to the utmost of their power exert themselves to recover horses or other property which may be stolen from any citizen or citizens of the United States by any individual or individuals of their tribes, and the property so recovered shall be forthwith delivered to the superintendant or other person authorized to receive it, that it may be restored to the proper owner; and in cases where the exertions of the chiefs shall be ineffectual in recovering the property stolen as aforesaid, if sufficient proof can be obtained that such property was actually stolen by any Indian or Indians belonging to the said tribes or either of them, the United States may deduct from the annuity of the said tribes a sum equal to the value of the property which has been stolen." Art. V.

See treaties containing similar provisions, *post*, pp. 91, 92.

Treaty of July 4, 1805, with the Wyandots and others, 7 Stat. L., 87.

The Indians acknowledge themselves to be in friendship with, and under the protection of the United States. Art. I.

United States to pay an annuity of $1,000. Art. IV.

Treaty of October 25, 1805, with the Cherokees, 7 Stat. L., 93.

All former treaties for the maintenance of peace and preventing of crimes are continued in force. Art. I.

Three thousand dollars to be paid immediately; $11,000 within ninety days of ratification of treaty and an annuity of $3,000. Art. III.

Treaty of November 10, 1808, with the Great and Little Osages, 7 Stat. L., 107.

"With a view to quiet the animosities which at present exist between the inhabitants of the territory of Louisiana and the Osage nations, in consequence of the lawless depredations of the latter, the United States do fur-

ther agree to pay to their own citizens, the full value of such property as they can legally prove to have been stolen or destroyed by the said Osage, since the acquisition of Louisiana by the United States, provided the same does not exceed the sum of five thousand dollars." Art. IV.

Indians paid $1,200 and goods to value of $1,500, to be delivered annually. Art. V.

The same provision as to payment for depredations as made in Art. V of the treaty with the Sacs and Foxes of November 3, 1804, *ante.* p. 89, is made in Art. IX.

Treaty of August 9, 1814, with the Creeks, 7 Stat. L., 120.

"A permanent peace shall ensue from the date of these presents forever between the Creek nation and the United States." Art. VIII.

Treaty of July 18, 1815, with the Poutawatamies, 7 Stat. L., 123.

"There shall be perpetual peace and friendship between all the citizens of the United States of America, and all the individuals composing the said Poutawatamie tribe or nation." Art. II.

The following treaties contain the same provision:

July 18, 1815, Piankishaws, 7 Stat. L., 124.
July 19, 1815, Teetons, 7 Stat. L., 125.
July 19, 1815, Sioux of the Lakes, 7 Stat L., 126.
July 19, 1815, Sioux of the River St. Peter's, 7 Stat. L., 127.
July 19, 1815, Yanctons, 7 Stat. L., 128.
July 20, 1815, Mahas, 7 Stat. L., 129.
September 20, 1815, Kickapoos, 7 Stat. L., 130.
September 12, 1815, Great and Little Osages, 7 Stat. L., 133.
September 14, 1814, Foxes, 7 Stat. L., 135.
September 16, 1815, Iaways, 7 Stat. L., 136.
October 28, 1815, Kanzas, 7 Stat. L., 137.
June 1, 1816, eight bands of the Sioux, 7 Stat. L., 143.
June 3, 1816, Winnebagos, 7 Stat. L., 144.
March 30, 1817, Menomenees, 7 Stat. L., 153.
June 24, 1817, Ottoes, 7 Stat. L., 154.
June 25, 1817, the Poncarars, 7 Stat. L., 155.

June 18, 1818, Grand Pawnees, 7 Stat. L., 172.
June 19, 1818, Noisy Pawnees, 7 Stat. L., 173.
June 20, 1818, Pawnee Republic, 7 Stat. L., 174.
June 22, 1818, Pawnee Marhars, 7 Stat. L., 175.

With two or three exceptions these contain also a provision acknowledging the Indians to be under the protection of the United States and no other nation.

Treaty of August 24, 1818, with the Quapaws, 7 Stat. L., 176.

Same provision as in Sac and Fox treaty of November 3, 1804, *ante*, p. 89.

Treaty of June 2, 1825, with the Great and Little Osages, 7 Stat. L., 240.

"With a view to quiet the animosities, which at present exist between a portion of the citizens of Missouri and Arkansas and the Osage tribes, in consequence of the lawless depredations of the latter, the United States do, furthermore, agree to pay, to their own citizens, the full value of such property, as they can legally prove to have been stolen, or destroyed by the Osages since the year eighteen hundred and eight, and for which payment has not been made under former treaties: *Provided*, The sum to be paid by the United States does not exceed the sum of five thousand dollars." Art. IX.

Treaty of June 3, 1825, with the Kansas Indians, 7 Stat. L., 244.

Same provisions as in treaty of November 3, 1804, with the Sacs and Foxes, *ante*, p. 89.

Treaty of June 9, 1825, with the Poncars, 7 Stat. L., 247.

"It is admitted by the Poncar tribe of Indians that they reside within the Territorial limits of the United States, acknowledge their supremacy, and claim their protection. The said tribe also admit the right of the United States to regulate all trade and intercourse with them." Art. I.

"That the friendship which is now established between the United States and the Poncar tribe should not be interrupted by the misconduct of individuals, it is hereby agreed that for injuries done by individuals no private revenge or retaliation shall take place, but instead thereof, complaint shall be made, by the party injured, to the superintendent or agent of Indian affairs, or other person

appointed by the President; and it shall be the duty of the said Chiefs, upon complaint being made as aforesaid, to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the United States. * * * And it is agreed that the Chiefs of said Poncar tribe shall, to the utmost of their power, exert themselves to recover horses or other property, which may be stolen or taken from any citizen or citizens of the United States, by any individual or individuals of said tribe; and the property so recovered shall be forthwith delivered to the agents or other person authorized to receive it, that it may be restored to the proper owner." Art. V.

See treaties containing similar provisions, *post*, 98.

Treaty of June 22, 1825, with the Teton, Yancton, and Yanctonies bands of Sioux, 7 Stat. L., 250.

Same provisions.

Similar provisions also occur in the following treaties: A large proportion of these also contain a pledge that "Henceforth there shall be a firm and lasting peace" between the United States and the Indians:

July 5, 1825, Sioune and Ogallala Sioux, 7 Stat. L., 252.

July 6, 1825, Chayennes, 7 Stat. L., 255.

July 16, 1825, Hunkpapas Sioux, 7 Stat. L., 257.

July 18, 1825, Ricaras, 7 Stat. L., 259.

July 30, 1825, with the Belantse-eteas or Minnetarees, 7 Stat. L., 261.

July 30, 1825, Mandans, 7 Stat. L., 264.

August 4, 1825, Crows, 7 Stat. L., 266.

September 26, 1825, Ottoes and Missouris, 7 Stat. L., 277.

September 30, 1825, Pawnees, 7 Stat. L., 279.

October 6, 1825, Mahas, 7 Stat. L., 282

Treaty of September 27, 1830, with the Choctaws, 7 Stat. L., 333.

"Perpetual peace and friendship is pledged and agreed upon by and between the United States and the Mingoes, Chiefs, and warriors of the Choctaw Nation of Red People." Art. I.

"Should a Choctaw or any party of Choctaws commit

acts of violence upon the person or property of a citizen of the U. S. or join any war party against any neighboring tribe of Indians, without the authority in the preceding article; and except to oppose an actual or threatened invasion or rebellion, such person so offending shall be delivered up to an officer of the U. S. if in the power of the Choctaw Nation, that such offender may be punished as may be provided in such cases, by the laws of the U. S.; but if such offender is not within the control of the Choctaw Nation, then said Choctaw Nation shall not be held responsible for the injury done by said offender." Art. VI.

Treaty of May 9, 1832, with the Seminoles, 7 Stat. L., 368.

"The Seminoles being anxious to be relieved from repeated vexatious demands for slaves and other property, alleged to have been stolen and destroyed by them, so that they may remove unembarrassed to their new homes; the United States stipulate to have the same property investigated, and to liquidate such as may be satisfactorily established, provided the amount does not exceed seven thousand (7,000) dollars." Art. VI.

Treaty of September 21, 1832, with the Sacs and Foxes, 7 Stat. L., 374.

"Peace and friendship are declared, and shall be perpetually maintained." Art. IX.

Treaty of February 14, 1833, with the Creeks, 7 Stat. L., 417.

"The Muskogee or Creek nation of Indians, west of the Mississippi declare themselves to be the friends and allies of the United States, under whose parental care and protection they desire to continue." Art. I.

Treaty of May 24, 1834, with the Chickasaws, 7 Stat. L., 450.

"It is agreed that perpetual amity, peace and friendship shall exist." Art. I.

"The Chickasaws pledge themselves never to make war upon any Indian people, or upon the whites, unless they are so authorized by the United States. But if war be made upon them, they will be permitted to defend themselves, until assistance be given to them by the United States, as shall be the case." Art. II.

Treaty of August 24, 1835, with the Comanches and Witchetas, 7 Stat. L., 474.

"Perpetual peace and friendship." Art. I.

Treaty of December 29, 1835, with the Cherokees, 7 Stat. L., 478.

"Perpetual peace and friendship." Art. VI.

Treaty of May 26, 1837, with the Kioway Ka-ta-ka and Ta-wa-ka-ro Nations, 7 Stat. L., 533.

"Perpetual peace and friendship." Art I.

"The nations or tribes named in this article further agree to pay the full value of any injury their people may do to the goods or property of the citizens of the United States, taken or destroyed when peaceably passing through the country they inhabit or hunt in, or elsewhere." Art. III.

Treaty of May 15, 1846, with the Comanches and others, 9 Stat. L., 845.

"The undersigned chiefs, warriors, and counsellors, for themselves and their said tribes or nations, do hereby acknowledge themselves to be under the protection of the United States, and of no other power, state, or sovereignty whatever." Art. I.

Provisions are made similar to those in Articles V and VI of the treaty of January 9, 1789, with the Wiandots, *ante*, p. 85, adding the following:

"And the chiefs of said tribes or nations shall give all necessary aid and protection to citizens of the United States in reclaiming and recovering such stolen horses." Arts. VII and VIII.

Treaty of June 5 and 17, 1846, with the Pottowautomie Nation, 9 Stat. L., 853

"It is solemnly agreed that the peace and friendship which so happily exist between the people of the United States and the Pottowautomie Indians shall continue forever; the said tribes of Indians giving assurance, hereby, of fidelity and friendship to the government and people of the United States; and the United States giving, at the same time, promise of all proper care and parental protection." Art. I.

Treaty of August 2, 1847, with the Chippewas of the Mississippi and Lake Superior, 9 Stat. L., 904.

"Peace and friendship shall be perpetual." Art. I.

Treaty of August 21, 1847, with the Pillager band of the Chippewas, 9 Stat. L., 908.

Same provision.

Treaty of August 6, 1848, with the Pawnees, 9 Stat. L., 949.

"The Pawnee nation renew their assurance of friendship for the white men, their fidelity to the United States, and their desire for peace with all the neighboring tribes of Indians.

The Pawnee nation, therefore, faithfully promise not to molest or injure the property or person of any white citizen of the United States, wherever found, nor to make war upon any tribes with whom said Pawnee tribes now are, or may hereafter be, at peace; but, should any difficulty arise, they agree to refer the matter in dispute to such arbitration as the President of the United States may direct." Art. IV.

Treaty of October 18, 1848, with the Menomonee, 9 Stat. L., 952.

"Peace and friendship shall be perpetual." Art. I.

Treaty of September 9, 1849, with the Navajos, 9 Stat. L., 974.

"The Indians acknowledge that the said tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain under the aforesaid jurisdiction and protection." Art. I.

"Perpetual peace and friendship shall exist" and the tribe will "remain at peace, and treat honestly and humanely all persons and powers at peace with said States." Art. II.

"The Government of the said States having the sole and exclusive right of regulating the trade and inter course with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and ef-

ficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection." Art. III.

All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the United States military authority. Art. V.

Treaty of December 30, 1849, with the Utahs, 9 Stat. L., 984.

Same provisions.

Treaty of July 23, 1851, with the See-see-toan and Wah-pay-toan Sioux, 10 Stat. L., 949.

"Peace and friendship shall be perpetual." Art. I.

Treaty of August 5, 1851, with the Med-ay-wa-kan-toan and Way-pay-koo-tay, 10 Stat. L., 954.

Peace and friendship shall be perpetual. Art. I.

Treaty of July 22, 1852, with the Chickasaws, 10 Stat. L., 974.

The Indians acknowledge themselves under the guardianship of the United States. Art. I.

Treaty of July 1, 1852, with the Apaches, 10 Stat. L., 979.

"Said Nation or tribe of Indians through their authorized chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction and government of the United States of America, and to its power and authority they do hereby submit." Art. I.

"Perpetual peace and amity shall forever exist between said Indians and the Government and people of the United States." Art. II.

"Said Nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers, at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse. Art. III.

Treaty of July 27, 1853, with the Camanche, Kiowa and Apache tribes, 10 Stat. L., 1013.

"Peace, friendship, and amity shall hereafter exist between the United States and the Camanche and Kiowa and Apache tribes of Indians, parties to this treaty, and the same shall be perpetual." Art. I.

"The Camanche, Kiowa, and Apache tribes, parties as before recited, do further agree and bind themselves to make restitution or satisfaction for any injuries done by any band or any individuals of their respective tribes to the people of the United States who may be lawfully residing in or passing through their said territories; and to abstain hereafter from levying contributions from, or molesting them in any manner; and, so far as may be in their power, to render assistance to such as need relief, and to facilitate their safe passage." Art. IV.

Treaty of September 10, 1853, with the Rogue River Indians, 10 Stat. L., 1018.

"For and in consideration of the cession and relinquishment contained in article 1st, the United States agree to pay to the aforesaid tribe the sum of sixty thousand dollars, fifteen thousand of which sum to be retained (according to the stipulations of article 4th of a 'treaty of peace made and entered into on the 8th day of September, 1853, between Genl. Jo Lane, commanding forces of Oregon Territory, and Jo, principal chief, Sam and Jim, subordinate chiefs, on the part of the Rogue River tribe of Indians') by the Superintendent of Indian Affairs to pay for the property of the whites destroyed by them during the late war; the amount of property so destroyed to be estimated by three disinterested commissioners, to be appointed by the Superintendent of Indian Affairs, or otherwise as the President may direct." Art. III.

Same provisions about depredations as in Article VI of the treaty of June 9, 1825, with the Poncars, *ante*, p. 92. Art. VI.

Treaty of September 19, 1853, with the Cow Creek band of Umpquas, 10 Stat. L., 1027.

Similar provisions as to depredations as in Article VI of the treaty of June 9, 1825, with the Poncars, *ante*, p. 92.

Treaty of March 15, 1854, with the Ottoe and Missouria Indians, 10 Stat. L., 1038.

"The said confederate tribes acknowledge their dependance on the government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of the Indians violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities." Art. IX.

Treaty of March 16, 1864, with the Omahas, 10 Stat. L., 1043.

Same provisions.

Treaty of May 6, 1854, with the Delawares, 10 Stat. L., 1048.

"The Delawares acknowledge their dependence on the Government of the United States, and invoke its protection and care. They desire to be protected from depredations and injuries of every kind, and to live at peace with all the Indian tribes; and they promise to abstain from war, and to commit no depredations on either citizens or Indians; and if, unhappily, any difficulty should arise, they will at all times, as far as they are able, comply with the law in such cases made and provided, as they will expect to be protected and their rights vindicated by it, when they are injured." Art. XIV.

Treaty of May 10, 1854, with the Shawnees, 10 Stat. L., 1053.

"The Shawnees acknowledge their dependence on the Government of the United States, and invoke its protection and care. They will abstain from the commission of depredations, and comply, as far as they are able, with the laws in such cases made and provided, as they will expect to be protected, and to have their rights vindicated." Art. XIV.

Treaty of May 17, 1854, with the Ioways, 10 Stat. L., 1069.

"They desire to be at peace with all men, and they bind themselves to commit no depredation or wrong upon either Indians or citizens; and whenever difficulties

arise, they will abide by the laws of the United States, in such cases made and provided, as they expect to be protected and to have their rights vindicated by them." Art. XI.

The same provision is contained in the Treaties of May 18, 1854, with the Sacs and Foxes, 10 Stat. L., 1074, of May 18, 1854, with the Kickapoos, 10 Stat. L., 1078, and of May 30, 1854, with the Kaskaskias and others, 10 Stat. L., 1082.

Treaty of November 18, 1854, with the Chasta and other Indians, 10 Stat. L., 1122.

"The said united bands acknowledge themselves subject to the Government of the United States, and engage to live in amity with the citizens thereof, and commit no depredations on the property of said citizens; and should any Indian or Indians violate this pledge, and the fact be satisfactorily proven, the property shall be returned, or if not returned, or if injured or destroyed, compensation may be made therefor out of their annuities." Art. VIII.

See treaties containing similar provisions, *infra.*

Treaty of November 29, 1854, with the Umpquas and Calapooias, 10 Stat. L., 1125.

The same provisions as in the above treaty, adding the following:

"Said Indians further engage to submit to, and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians. Art. VIII.

Similar provisions are contained in the treaties of January 22, 1855, Willamettes and others, 10 Stat. L., 1143.

January 22, 1855, the Dwamish and other Indians, 12 Stat. L., 927.

December 26, 1854, Nisquallies and others, 10 Stat. L., 1132.

January 26, 1855, S'Klallams, 12 Stat. L., 933.

January 31, 1855, Makahs, 12 Stat. L., 939.

June 9, 1855, Walla-Wallas and others, 12 Stat. L., 945.

June 9, 1855, Yakamas, 12 Stat. L., 951.

June 11, 1855, Nez Perces, 12 Stat. L., 957.

June 25, 1855, Confederated bands of Walla-Wallas and Wascoes, 12 Stat. L., 963.

July 1, 1855, Qui-nai-elts and others, 12 Stat. L., 971.

July 16, 1855, Flatheads and others, 12 Stat. L., 975.

Treaty of February 22, 1855, with the Chippewas, 10 Stat. L., 1165.

"The laws which have been or may be enacted by Congress regulating trade and intercourse with the Indian tribes, to continue and be in force within and upon the several reservations provided for herein." Art. VII.

"The said bands of Indians, jointly and severally, obligate and bind themselves not to commit any depredations or wrong upon other Indians, or upon citizens of the United States; to conduct themselves at all times in a peaceable and orderly manner; to submit all difficulties between them and other Indians to the President, and to abide by his decision in regard to the same, and to respect and observe the laws of the United States, so far as the same are to them applicable." Art. IX.

Treaty of February 27, 1855, with the Winnebagos, 10 Stat. L., 1172

Similar provisions.

Treaty of October 17, 1855, with the Blackfoot and Flathead Nations, 11 Stat. L., 657.

"Peace, friendship, and amity shall hereafter exist between the United States and the aforesaid nations and tribes of Indians, parties to this treaty, and the same shall be perpetual." Art. I.

"The aforesaid tribes acknowledge their dependence on the Government of the United States and promise to be friendly with all citizens thereof, and to commit no depredations or other violence upon such citizens. And should any one or more violate this pledge, and the fact be proved to the satisfaction of the President, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the Government out of the aunuities. The aforesaid tribes are hereby bound to deliver such offenders to the proper authorities for trial and punishment, and are held responsible in their tribal capacity to make reparation for depredations so committed." Art. XI.

"It is agreed and understood, by and between the parties to this treaty, that if any nation or tribe of Indians

aforesaid, shall violate any of the agreements, obligations, or stipulations herein contained, the United States may withhold for such length of time as the President and Congress may determine, any portion or all of the annuities agreed to be paid to said nation or tribe under the ninth and tenth articles of this treaty." Art XII.

Treaty of April 19, 1858, with the Yancton Sioux, 11 Stat. L., 743.

"The Yanctons acknowledge their dependence upon the Government of the United States, and do hereby pledge and bind themselves to preserve friendly relations with the citizens thereof, and to commit no injuries or depredations on their persons or property, nor on those of members of any other tribe or nation of *of* Indians; and in case of any such injuries or depredations by said Yanctons, full compensation shall, as far as possible, be made therefor out of their tribal annuities, the amount in all cases to be determined by the Secretary of the Interior." Art. XI.

Treaty of March 12, 1858, with the Poncas, 12 Stat. L., 997.

Same provision as in Article IX of above treaty.

The same provision occurs in the treaty of June 19, 1858, with the Mendawakanton and Wahpakootas Sioux, and June 19, 1858, with the Sisseeton and Wahpaton Sioux, 12 Stat. L., 1031, 1037.

Treaty of July 30, 1863, with the Shoshonees, 13 Stat. L., 663.

"It is agreed that friendly and amicable relations shall be re-established between the bands of the Shoshonee nation, parties hereto, and the United States; and it is declared that a firm and perpetual peace shall be henceforth maintained between the said bands and the United States." Art. I.

Treaty of October 2, 1863, with certain bands of the Chippewas, 13 Stat. L., 667.

"Peace and friendship shall be perpetual." Art. I.

"And in further consideration of the foregoing cession, and of their promise to abstain from such acts in the future, the United States agree that the said Red Lake and Pembina bands of Chippewa Indians shall not be held liable to punishment for past offenses. And in order to make compensation to the injured parties for

the depredations committed by the said Indians on the goods of certain British and American traders at the mouth of Red Lake River, and for exactions forcibly levied by them on the proprietors of the steamboat plying on the Red River, and to enable them to pay their just debts, the United States agree to appropriate the sum of one hundred thousand dollars." Art. IV.

Treaty of October 7, 1863, with the Tabeguache band of Utahs, 13 Stat. L., 673.

"It is admitted by the Tabeguache band of Utah Indians that they reside within the territorial limits of the United States, acknowledge their supremacy, and claim their protection. The said band also admits the right of the United States to regulate all trade and intercourse with them." Art. I.

Similar provisions about depredations to those of Article V of the treaty of November 3, 1804, with the Sacs and Foxes, 7 Stat. L., 84, are made in Art. VI.

Treaty of October 12, 1863, with the Shoshonee-Goship bands, 13 Stat. L., 681.

"Peace and friendship is hereby established and shall be hereafter maintained between the Shoshonee-Goship bands of Indians and the citizens and government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States, within their country, shall cease." Art. I.

"And if depredations are at any time committed by bad men of their own or other tribes within their country, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offenses may deserve; and the safety of all travelers passing peaceably over either of said routes is hereby guaranteed by said bands." Art. II.

Treaty of August 12, 1865, with the Woll-pah-pe tribe of Snakes, 14 Stat. L., 683.

"Peace is declared henceforth." Art. I.

"The said Woll-pah-pe tribe promise to be friendly with the people of the United States, to submit to the authority thereof, and to commit no depredations upon the persons or property of citizens thereof, or of other In-

dian tribe; and should any member of said tribe commit any such depredations, he shall be delivered up to the agent for punishment, and the property restored. If after due notice the tribe neglect or refuse to make restitution, or the property is injured or destroyed, compensation may be made by the government out of the annuities hereinafter provided." Art. IV.

Treaty of September 29, 1865, with the Great and Little Osages, 14 Stat. L., 687.

"The Osages acknowledge their dependence on the government of the United States, and invoke its protection and care; they desire peace and promise to abstain from war, and commit no depredations on either citizens or Indians." Art. X.

Treaty of October 10, 1865, with the Minneconjou band of Sioux, 14 Stat. L., 695.

"The Minneconjou band of Dakota or Sioux Indians, represented in council, hereby acknowledge themselves to be subject to the exclusive jurisdiction and authority of the United States, and hereby obligate and bind themselves individually and collectively, not only to cease all hostilities against the persons and property of its citizens, but to use their influence, and, if requisite, physical force, to prevent other bands of the Dakota or Sioux, or other adjacent tribes, from making hostile demonstrations against the Government or people of the United States." Art. I.

Similar provisions occur in the following treaties:

October 14, 1865, Lower Brule Sioux, 14 Stat. L., 699.

October 19, 1865, Two Kettles Sioux, 14 Stat. L., 723.

October 19, 1865, Blackfeet Sioux, 14 Stat. L., 727.

October 20, 1865, Sans Arcs Sioux, 14 Stat. L., 731.

October 20, 1865, Yanktonai Sioux, 14 Stat. L., 735.

October 20, 1865, Ounkpahpah Sioux, 14 Stat. L., 739.

October 28, 1865, Upper Yanktonais Sioux, 14 Stat. L., 743.

October 28, 1865, O'Gallala Sioux, 14 Stat. L., 747.

Treaty of October 14, 1865, with the Cheyennes and Arrapahoes, 14 Stat. L., 703.

"It is agreed by the parties to this treaty, that hereafter perpetual peace shall be maintained between the

people and the Government of the United States and the Indians parties hereto, and that the Indians parties hereto shall forever remain at peace with each other, and with all other Indians who sustain friendly relations with the Government of the United States. * * * And the Indians parties hereto, on their part, agree, in case crimes or other violations of law shall be committed by any person or persons, members of their tribe, such person or persons shall, upon complaint being made in writing to their agent, superintendent of Indian affairs, or to other proper authority, by the party injured, and verified by affidavit, be delivered to the person duly authorized to take such person or persons into custody, to the end that such person or persons may be punished according to the laws of the United States." Art. I.

"It is further agreed by the Indians parties hereto that when absent from their reservation they will refrain from the commission of any depredations or injuries to the person or property of all persons sustaining friendly relations with the Government of the United States." Art. II.

Treaty of October 17, 1865, with the Apache, Cheyenne and Arrapahoe tribes, 14 Stat. L., 713.

Confirms the foregoing.

Treaty of October 18, 1865, with the Camanche and Kioway tribes, 14 Stat. L., 717.

Similar provisions.

Treaty of March 21, 1866, with the Seminoles, 14 Stat. L., 755.

"There shall be perpetual peace between the United States and the Seminole Nation, and the Seminoles agree to be and remain firm allies of the United States, and always faithfully aid the Government thereof to suppress insurrection and put down its enemies." Art. I.

Treaty of April 7, 1866, with the Bois Forte band of Chippewas, 14 Stat. L., 765.

"Peace and friendship shall be perpetual." Art. I.

Treaty of April 28, 1866, with the Choctaws and Chickasaws, 14 Stat. L., 769.

"Permanent peace and friendship are hereby established." Art. I.

Treaty of June 14, 1866, with the Creeks, 14 Stat. L., 785.

"There shall be perpetual peace and friendship between the parties to this treaty, and the Creeks bind themselves to remain firm allies and friends of the United States, and never to take up arms against the United States, but always faithfully to aid in putting down its enemies." Art. I.

Treaty of February 19, 1867, with the Sissiton and Warpeton bands of Sioux, 15 Stat. L., 505.

"The Sissiton and Warpeton bands of Dakota Sioux Indians, represented in council, will continue their friendly relations with the Government and people of the United States, and bind themselves individually and collectively to use their influence to the extent of their ability to prevent other bands of Dakota or other adjacent tribes from making hostile demonstrations against the Government or people of the United States." Art. I.

Treaty of October 21, 1867, with the Kiowa and Comanche Indians. 15 Stat. L., 581.

"From this day foward all war between the parties to this agreement shall forever cease.

"The Government of the United States desires peace, and its honor is here pledged to keep it. The Indians desire peace and they now pledge their honor to maintain it. * * *

"If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black or Indians, subject to the authority of the United States and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws, and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as, in his judgment, may be proper; but no

such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs and the Secretary of the Interior; and no one sustaining loss, while violating or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor." Art. I.

Similar provisions are contained in the following treaties:

October 21, 1867, Kiowas, Comanches and Apaches, 15 Stat. L., 589.

October 28, 1867, Cheyennes and Arrapahoes, 15 Stat. L., 593.

April 29, 1868, different tribes of Sioux, 15 Stat. L., 635.

May 7, 1868, Crows, 15 Stat. L., 649.

May 10, 1868, Northern Cheyennes and Arrapahoes, 15 Stat. L., 655.

June 1, 1868, Navajoes, 15 Stat. L., 667.

July 3, 1868, Eastern Shoshonees and Bannacks, 15 Stat. L., 673.

Treaty of March 2, 1868, with the Tabeguache and other Utes, 15 Stat. L., 619.

The provisions above quoted (*ante.*, p. 103) from the treaty of October 7, 1863, are affirmed by Article I, and provisions similar to the foregoing are made as to depredations.

Treaty of October 14, 1864, with the Klamath, Moadoc and other Indians, 16 Stat. L., 707.

"The several tribes of Indians parties to this treaty acknowledge their dependence upon the Government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct." Art. IX.

APPENDIX C.

Indian depredation claims filed in the Interior Department, originating in Oregon and Washington, in 1855 and 1856. Compiled from H. R. Ex. Doc. 125, 49th Cong., 1st Sess. See *ante*, pp. 8, 10, 12.

Claimant's Name.	Indians Charged.	Date of depredation.	Date of filing claim.	Was it allowed before 1885?	Allowed under act of 1885, reported in H. R. Ex. Doc.
M. Valk & Bro.	Rogue River.	1856	1867		
Mrs. Christina Kiehl	Oregons.	1856			
J. E. McClure	Oregons.	1856	1860		
John C. Waldo	Rogue River.	1856	1865		
Daniel E. Lane	Indians in Washton.	1855	1866		277,51 C. 2 S.
Isaac N. Bentley	Rogue River.	1855	1868		
John Campbell	Klickitats.	1855	1869	Yes.	277,51 C. 2 S.
Brooke, Bomford & Co.	Oregon.	1856	1871		
Henry Kyle	"	1856	1857		
James Brookings	"	1856	1873		
Catrarine West Brook	Rogue River.	1856	1873		
J. A. J. & J. H. McVey	" "	1856	1873		
Dennis Tryon	" "	1856	1873		103,50 C. 2 S.
M. B. Gregory	" "	1856	1873		
Thomas Van Pelt	" "	'55'6	1873		
Charles Brown	" "	1856	1873		
A. F. Miller	Oregon.	1856	1873		
John Felderwerd & J. O'Loughlin	"	1856	1873		
Jonathan McCarthy	Washington.	1855	1873		
Thomas W. Beale	Oregon.	1855	1873		
John Kipps	Rogue River.	1856	1873	Yes.	34,50 C. 1 S.
Michael Thomas	" "	1856	1876		103,50 C. 2 S.
Dennis Tryon	" "	1856	1876		" "
Hiram Smith	" "	'55'6			
John J. Hill	Coquilles.	1855	1858	Yes.	
Charles Ogdon	Cayuse and Walla Walla.	1856	1858		
N. J. & P. Ownby	Rogue River.	1855	1858		
J. M. Findley	Klikitats.	1856	1856		
George F. Fry	Oregon.	1856	1857		
Louis O. Merilatt	"	1855	1855		
James O'Flynn	Nisqually.	1855	1857		
David S. Maynard	Oregon.	1856	1856		
Thomas McNatt	Klikitats.	1856	1856	Yes.	
William M. Murphy	Oregon.	1856	1856		
S. A. Maple	"	1856	1856		
Eli B. Maple	"	1856	1856	Yes.	34,50 C. 1 S.
Francis McNatt	"	1856	1856	Yes.	" "
John J. Mass	"	1856	1856	Yes.	

Claimant's Name.	Indians Charged.	Date of depredation.	Date of filing claim.	Was it allowed before 1885?	Allowed under act of 1885, reported in H. R. Ex. Doc.
Thomas Mercer	Oregon.	1856	1856	Yes.	
D. A. Neely	"	1856	1856	Yes.	
J. H. Nale	"	1856	1856		
Thomas Pierce	Klikitats.	'55'6	1856	Yes.	34,50 C. 2 S.
Cornelius J. Palmer	"	1856	1856		277,51 C. 2 S.
Lovel L. Peck	"	1856	1856		
William Charles	Walla Walla.	1855			
John Bradley	White River, Yallups & Nisquallies.	'55'6	1879		
William H. Barnhart	Walla Walla.	1855	1880		
W. R. Downey	Washington.	1855	1880	Yes.	34,50 C. 1 S.
Peter Smith	"	1856	1880		" "
Isaac Woolery	Puyallup and Nisqually.	1855	1857	Yes.	" "
Robert S. Moore	Nisqually & others.	1856	1857		103,50 C. 2 S.
Ronmarez Nix	" "	1856.	1857		" "
William Kincaid	" "	1856	1857	Yes.	34,50 C. 1 S.
Abram H. Woolery	" "	1856	1857	Yes.	" "
John Meison	" "	1856	1857		
J. W. McCarty	" "	1856	1857		
Nicholas Delane	" "	1856	1857		103,50 C. 2 S.
Daniel E. Lane	" "	'55'6	1857		
Willis Boatman	" "	'55'6	1857		103,50 C. 2 S.
W. K. Melville	" "	'55'6	1857		" "
J. B. Leach	" "	1856	1857		" "
Peter Judson	" "	1856	1857		122,51 C. 1 S.
Henry Whitesell	" "	1856	1857		103,50 C. 2 S.
Chauncey Baird	Puyallup & others.	1856	1857		
Chas. H. Bitting	Nisqually & others.	1856	1857		103,50 C. 2 S.
Adam Benston	" "	1856	1857		122,51 C. 1 S.
John Carson	" "	'55'6	1880		103,50 C. 2 S.
R. A. Fennell	" "	1855	1880		
Charles Wren	" "	1856	1880		
Lemon & Perham	" "	1856	1880		
Peter Smith	" "	1856	1880	Yes.	
Thomas Hadley	" "	1856	1880	Yes.	
A. L. Porter	" "	1856	1880	Yes.	122,51 C. 1 S.
Thomas J. Perkins	" "	1856	1880		
George Brown	" "	1856	1880	Yes.	34,50 C. 1 S.
James Riley	" "	1855	1880		
Dominick Corcoran	" "	1855	1880		277,51 C. 2 S.
B. F. Wright	" "	'55'6	1880		34,50 C. 1 S.
Israel H. Wright	" "	1855	1880		103,50 C. 2 S.
Charles W. Riley	" "	1856	1880		
William Benston	" "	1856	1880		122,51 C. 1 S.
George Hayward	" "	1856	1880		
S. S. Saunders	Yakima & others.	1856	1857	Yes.	
James E. Williamson	Puyallup, Nisqually and Klikitats.	1856	1880	Yes.	122,51 C. 1 S.

Claimant's Name.	Indians Charged.	Date of depredation.	Date of filing claim.	Was it allowed before 1885?	Allowed under act of 1885, reported in H. R. Ex. Doc.
Henry Adams . . .	Washington.	1856	1857		
Solomon B. Anthony	Yakama.	1855	1857		
Anderson & McKinlay	Walla Walla.	1855			
William N. Bell . . .	Washington.	1856	1856	Yes.	77,49 C. 2 S.
R. H. Beaman . . .	Rogue River.	1855	1857		
H. P. Barrow	" "	1856	1857		
James H. Bean . . .	Umpquas.	1856	1857	Yes.	77,49 C. 2 S.
William Bragg . . .	Cow Creeks.	1856	1857	Yes.	
Lewis Barnes	Rogue River.	1855	1858	Yes.	
William Barton . . .	" "	1855	1858		34,50 C. 1 S.
Ezkiel Bailey	" "	1855	1858		277,51 C. 2 S.
John Byron	Cow Creeks.	1856	1858	Yes.	34,50 C. 1 S.
Bradford & Bishop .	Washington.	1856	1857		
Wm. H. Brannan . .	Nisquallies.	'55'6	1857	Yes.	34,50 C. 1 S.
I. H. Bush	Klikitats.	1856	1857		
R. H. Beatty	Washington.	1856	1857	Yes.	34,50 C. 1 S.
Joseph Brannan . . .	"	1855	1857		122,51 C. 1 S.
Charles E. Brounell .	"	1856	1857		
John Buckley	"	'55'6	1857		
Raphael Brunn . . .	S'Kokomish.	1855	1857		
William H. Brown .	Washington.	1856	1857		
D. F. & P. F. Bradford	"	1856	1857		277,51 C. 2 S.
B. B. Bishop	Yakama.	1856	1857		
W. T. Clinton	Washington.	1855	1855		
John Creighton . . .	Coquilles.	1855	1856		
A. B. Colver	"	1855	1856		
George E. Cole . . .	Yakimas.	1856	1856		
L. M. Collins	White R., Klikitats.	1856	1856		
Israel Clark	Tillamack.	1855	1857		
Hugh H. Conley . .	Rogue River.	1855	1857		
Elijah Croxton . . .	Cow Creeks.	1855	1857	Yes.	103,50 C. 2 S.
Martin Combs	" "	1855	1857		34,50 C. 1 S.
Thomas Cowan . . .	Umpquas.	'55'6	1858		
John Campbell . .	Klikitats.	1855	1857		
John Chevallier & J. H. Avery	Yakimas.	1855	1857		
John B. Dickenson .	S'Kokomish.	1856	1856		
W. P. Day	Rogue River.	1856	1856	Yes.	34,50 C. 1 S.
David T. Denny . . .	Washington.	1856	1856		
Isaac H. Davis . . .	Cow Creeks.	1855	1856		
Peter Dougherty . . .	Coquilles.	1855	1857		
Sherley Ensign . . .	Walla Walla.	1856	1856		277,51 C. 2 S.
Charles H. Eaton . .	Nisquallies.	1856	1856		34,50 C. 1 S.
Allen Embree	Umpquas.	1856	1857		" "
Simeon Geils	Klikitats.	1856	1856		
G. W. Goodell . .	Nisqually.	1855	1856		
Thomas W. Glasgow	"	1856	1856		122,51 C. 1 S.
Walter Graham . . .	White River, Nisqually, etc.	1856	1856		34,50 C. 1 S.

Claimant's Name.	Indians Charged.	Date of depredation.	Date of filing claim.	Was it allowed before 1885?	Allowed under act of 1885, reported in H. R. Ex. Doc.
R. M. Gurney	Rogue River.	1855	1858		34,50 C. 1 S.
Dr. S. L. Grow	Nisqually.	'55'6	1857		
George & Co.	Dwamish.	'55'6	1857		
E. S. Hanford	Washington.	1856	1856		103,50 C. 2 S.
Edward Hanford	"	1856	1856		
John Hennings	"	1856	1856		
August Hograve	"	1856	1856		
James H. Hermance	Klikitats.	1856	1856		277,51 C. 2 S.
E. C. Hardy	"	1856	1856		" "
F. G. Imans	"	1856	1856		" "
Bradford Johnson	"	1856	1856		
George W. Johnson	"	1856	1856		
E. S. Joselyn	"	1856	1856		
Harvy H. Jones	Washington.	1855	1855		
John K. Jones	Rogue River.	1855	1857		
William R. Kilbourn	Klikitats.	1856	1856		
Moses Kirkland	"	1855	1856		103,50 C. 1 S.
Joseph Knott	Rogue River.	1855	1857		34,50 C. 1 S.
George E. King	Nisqually & others.	1855	1857		
William S. King	Rogue River.	1855	1857		
C. C. Lewis	White R. & others.	1856	1856		
James H. Lake	Washington.	1855	1856		
James Longmire	Nisqually & others.	1855	1856	Yes.	34,50 C. 1 S.
John P. Ladd	Rogue River.	1855	1857		122,51 C. 1 S.
John P. Ladd	" "	1855	1857		" "
William N. Lynch	" "	1856	1857		
Daniel A. Levens	" "	1855	1858		34,50 C. 1 S.
Nathan B. Lane	" "	1855	1855	Yes.	
Lewis Latour	Washington.	1855			
Mary, steamer	"	1856	1856		
Abiel Morrison	Puyallups.	1855	1857	Yes.	
Alex. McNary	Rogue River.	1856	1857	Yes.	
B. F. McKeen	" "	1856	1857		
William Moffatt	" "	1856	1858		
Carreck S. Maynatt	" "	1855	1858		
William McCullough	Cow Creeks.	1855	1858	Yes.	34,50 C. 1 S.
A. E. McCullough	" "	1856	1858	Yes.	77,49 C. 2 S.
Samuel C. Moore	Umpquas.	1856	1858	Yes.	" "
Granville Naylor	Rogue River.	1855	1857		
Brothers Northcutt	Cow Creeks.	1855	1857	Yes.	
George D. Nichols	Rogue River.	1855	1858		
Martin W. Newland	" "	1855	1858	Yes.	34,50 C. 1 S.
H. B. Oatman	" "	1855	1857	Yes.	
W. H. Packwood	" "	1856	1857		
John V. Pinkerton	Cow Creeks.	1855	1857	Yes.	
W. H. Packard	Coquilles.	1856	1857		
Plumber & Chase	Washington.	1856	1857	Yes.	
R. C. Percival	Rogue River.	1855			34,50 C. 2 S.
James N. Poindexter	" "	1855			

Claimant's Name.	Indians Charged.	Date of depredation.	Date of filing claim.	Was it allowed before 1885?	Allowed under act of 1885, reported in H. R. Ex. Doc.
Henry W. Queene	Rogue River.	1855	1858		
Joseph Roquebom	" "	1855	1856		
S. W. Russell	White River.	1856	1856		103,50 C. 1 S.
Joseph Robbins	Klikitats.	1856	1856		27,51 C. 2 S.
O. P. Robbins	Rogue River.	1855	1857		
John A. Richards	" "	1855	1858	Yes.	103,50 C. 2 S.
Henry Saffaran	" "	1856	1856		" "
James R. Smith	Nisqually.	1856	1856		
Levi Shelton	"	1855	1855	Yes.	34,50 C. 1 S.
George W. Shazer	Washington.	1855	1856		
David Stanley	"	1856	1856		
Henry Shepard	Klikitats.	1856	1856		103,50 C. 2 S.
E. M. Smithers	Washington.	1856	1856	Yes.	34,50 C. 1 S.
H. A. Smith	"	1856	1856		122,51 C. 1 S.
Thomas J. Sharp	Manrettan (Oregon).	1855	1857		
B. E. Simmons	Cow Creek.	1855	1857		
Hiram Smith	" "	1855	1857		
D. W. Stearns	" "	1855	1857		103,50 C. 2 S.
Smith & Burbier	Washington.	1855	1857		
Hiram Smith	Rogue River.	1855			
James Sinclair	Walla Walla.	1855			
Sidney B. Simons	Washington.	1856			
C. C. Thompson	"	1856	1856		
James M. Thompson	"	1856	1856		
Benjamin Taylor	Rogue River and Klamaths.	1855	1855		
Tichnor & Lundry	Rogue River.	1856	1857		277,51 C. 2 S.
James Twogood	" "	1856	1858		
George Tykel	Washington.	1855	1857		
John M. Thomas	Nisqually.	'55'6	1857	Yes.	
Ira W. Utler	Washington.	1856	1856	Yes.	
Henry Van Asset	"	1856	1856	Yes.	122,51 C. 1 S.
F. M. Vanderpool	Klikitats.	1856	1856	Yes.	34,50 C. 2 S.
Daniel Varner	"	1855	1856	Yes.	
John P. Walker	Rogue River.	1856	1857		
M. & Elizabeth Walker	" "	1855	1857		
James S. Wells	Cow Creeks.	1855	1857	Yes.	103,50 C. 2 S.
William White	Coquilles.	1856	1857		
William E. Weekly	Rogue River.	1855	1858		103,50 C. 2 S.
H. H. Woodward	Coquilles.	1855	1858	Yes.	
J. B. Webber & Co.	Snoqualmies.	1855	1857		
William B. Wilton	Washington.	1855	1857		
G. F. Whitworth	Nisqually.	'55'6	1857		
M. D. Wooden & Co.	Washington.	1856	1857		
William Wilson	Yakimas.	1856	1857		
Charles Williams	Rogue River.	1856	1857		103,50 C. 2 S.
Dr. Jos. Williamson	Washington.	1856			
Samuel Walker	"	1855	1857		
John Yokum	Cow Creek.	1856	1857		

Claimant's Name.	Indians Charged.	Date of depredation.	Date of filing claim.	Was it allowed before 1885?	Allowed under act of 1885, reported in H. R. Ex. Doc.
S. M. Hamilton	Klikitats.	1856	1856		277,51 C. 2 S.
John Harvey	Klikitats, Puyallup	1856	1856		
George Holt	Washington.	1856	1856		
L. J. Holgate	"	1856	1856		
John C. Holgate	"	1856	1856		
Mary A. Harris	Rogue River.	1855	1856		34,50 C. 1 S.
William Huston	Umpquas.	1856	1857	Yes.	103,50 C. 2 S.
S. M. Holderness	Skagits.	1855	1857		
A. N. Hamm	Washington.	1855	1857		
J. T. Hall & others	"	1855	1857		
E. S. Joslyn	Klikitats.	1856	1857		
Samuel A. Maple	White Rivers.	1856	1857	Yes.	
William McBean	Yakamas & others.	'55'6	1857	Yes.	
McPherson, McGuire and Doncette	Rogue River.	1856	1857		
Geo. L. McPherson and Peter McGuire	" "	1856	1857		
G. Maupin	" "	1855			
John Moor	Walla Walla.	1855			
Jonathan McCarty	Nisqually and Puyallup.	1855			
Benjamin Brown	Washington.	1856	1857		
Mathew P. Burns	Nisqually.	1856	1857		
Mathew P. Burns	"	1856	1857		
William B. Bolton	Skagits.	1855	1857	Yes.	34,50 C. 1 S.
Brooke, Bomford & Noble	Walla Walla.	1855			
J. A. Dickey	Rogue River.	1855			
C. M. Reavis	" "	1855			
E. J. Northcutt & Bros.	" "	1855	1880	Yes.	
Henry W. Wixon	" "	1855	1880		103,50 C. 2 S.
Peter Wilson	Washington.	'55'6	1881	Yes.	
Henry Smith	"	1856	1881	Yes.	34,50 C. 1 S.
George Edwards	"	1855	1881	Yes.	277,51 C. 2 S.
James Hughes	"	1855	1881	Yes.	" "
Meyer Frederick	"	'55'6	1881	Yes.	
Jacob Kersner	"	'55'6	1881	Yes.	
Peter Renquist	"	1855	1881	Yes.	
Carl L. Gohrich	"	1855	1881	Yes.	
Peter Weaver	Oregons.	'55'6	1881		
Geo. W. Day	Rogue River.	1856	1883	Yes.	34,50 C. 1 S.
John Fisher	Cow Creeks.	1855	1883	Yes.	
Wm. F. Briggs	" "	1855	1884	Yes.	34,50 C. 1 S.
John W. Redfield	Rogue River.	1855	1884		277,51 C. 2 S.
Linas Bushnell	" "	1855	1884		
Thomas Belshaw	" "	1855	1884		
Catharine Woodward	Yakimas.	'55'6	1884		
Mary Anne Grandrau	"	'55'6	1884		277,51 C. 2 S.
W. C. McKay	"	1855	1884		

Claimant's Name.	Indians Charged.	Date of depredation.	Date of filing claim.	Was it allowed before 1885?	Allowed under act of 1885, reported in H. R. Ex. Doc.
Mrs. E. A. Bellion . .	Yakimas, Klikitats.	1856	1884		277, 51 C. 2 S.
Joshua Wright . . .	Rogue River.	1855	1884		
Caroline Sexton . . .	Rogue River and others.	'55'6	1884		277, 51 C. 2 S.
Margaret M. Ruddell	Nisqually.	1856	1884		
H. H. Chase	Cayuse & Umatillas.	1855	1885		277, 51 C. 2 S.
Andrew D. Pambrun	" "	'55'6	1885		
Tousaint Morrissett .	" "	'55'6	1885		
Nancy Hughey, formerly Nancy Barkwell	Oregon.	'55'6	1885		
Garrett Crockett . . .	Rogue River.	1855	1885		
Mary Adams	" "	1856	1885		
David S. Holton . . .	" "	1856	1886		

APPENDIX D.

Claims paid by Congress for Indian depredations committed during flagrant hostilities. See other instances cited, *ante*, p. 9.

OREGON WAR OF 1853.

(See Massacres of the Mountains, p. 196.)

Treaty of September 10, 1853, $15,000 is taken from Indian funds to pay for depredations "during the late war."

OUTBREAK OF INKPA-DU-TAH'S SIOUX AT SPIRIT LAKE, MINN.; IN 1857.

Act of March 2, 1861, 12 Stat. L., 203, appropriation of $9,640.74 for destruction of property at this time.

MODOC WAR OF 1872–1873.

(See Massacres of the Mountains, p. 552.)

Act of March 20, 1884, 23 Stat. L., 525, $4,000 is appropriated to pay Mrs. Louisa Boddy for property destroyed by Modoc Indians on November 29, 1872.

NORTHERN CHEYENNE RAID OF 1878.

Act of May 17, 1882, 22 Stat. L., 86, $9,870.10 is appropriated to pay sufferers by this raid.

Act of July 4, 1884, 23 Stat. L., 95, $4,447.35 is appropriated to pay sufferers by this raid.

UTE HOSTILITIES IN 1879 (MEEKER MASSACRE).

(See Massacres of the Mountains, p. 704.)

Act of June 15, 1880, 21 Stat. L., 198, annuities are to be paid by the Utes for the killing of Meeker and others.

Act of July 4, 1884, 23 Stat. L., 97, $4,419.10 is appropriated to pay for the destruction of property at this time.

APPENDIX E.

Reports of the Secretary of the Interior to Congress on Indian depredation claims. (See brief, *ante*, p. 10.)

I. UNDER ACT OF MAY 29, 1872, *ante*, p. 74.

H. R. Ex. Doc. 65, 43d Cong., 2d Sess.

H. R. Ex. Doc. 147, 44th Cong., 1st Sess.
H. R. Ex. Doc. 135, 47th Cong., 1st Sess.
H. R. Ex. Doc. 10, 47th Cong., 2d Sess.
H. R. Ex. Doc. 23, 48th Cong., 1st Sess.
H. R. Ex. Doc 102, 48th Cong., 1st Sess.
H. R. Ex. Doc. 20, 48th Cong., 2d Sess.
H. R. Ex. Doc. 86, 48th Cong., 2d Sess.
H. R. Ex. Doc. 182, 48th Cong., 2d Sess.
H. R. Ex. Doc. 197, 48th Cong., 2d Sess.

II. UNDER ACT OF MARCH 3, 1885, AND SUBSEQUENT ACTS, *ante*, pp. 76, 77.

H. R. Ex. Doc. 125, 49th Cong., 1st Sess.
H. R. Ex. Doc. 77, 49th Cong., 2d Sess.
H. R. Ex. Doc. 34, 50th Cong., 1st Sess.
H. R. Ex. Doc. 103, 50th Cong., 2d Sess.
H. R. Ex. Doc. 122, 51st Cong., 1st Sess.
H. R. Ex. Doc. 277, 51st Cong., 2d Sess.

APPENDIX F.

Opinion of Commissioner of Indian Affairs in case of Joel Hedgpeth, and others, filed in the Court of Claims in the case of Rose v. *United States, No. 2176, Indian.*

"DEPARTMENT OF THE INTERIOR,
"Office of Indian Affairs,
"WASHINGTON, *February 3, 1860.*

"SIR: In the matter of Joel and Thomas R. Hedgpeth, of Leonard J. Rose, and of Robert Perkins, for spoliations alleged to have been committed by Indians in New Mexico, the papers in which were referred by you to this office during the last session of Congress, but were omitted from oversight, as I am informed, to be acted upon, I have the honor to submit the following report:

"It appears that the Messrs. Hedgpeth left the State of Missouri in 1858, for California, by the way of Albuquerque in New Mexico, and that Mr. Rose and Mr. Perkins left the State of Iowa for California also, in 1858;

that these parties all met at the Little Kansas in the Territory of Kansas, and proceeded thence together, and that they arrived safely at Albuquerque; upon consultation they decided, all circumstances considered, that it was safest and most advisable to proceed by what is known as Beal's route, and there they employed a guide upon the recommendation of Col. Bonneville, whom they agreed to pay for his services the sum of $500. The first theft was committed at the Peachtree Springs, about 112 miles east of the Colorado River, by a party of Indians calling themselves Cosmenos, as alleged. But the most of their losses are said to have occurred further on, through the violence of the Mohaves. Joel Hedgpeth claims to have been damaged to the amount of $4,130. Thomas R. Hedgpeth claims to have been damaged to the amount of $1,644. Leonard J. Rose to the amount of $27,832.76; and Robert Perkins, $4,240. I do not think it competent that I should express an opinion upon the evidence in these cases as to the value of the losses, etc., as I am of the opinion that the law gives me no jurisdiction in the premises.

"The 17th section of the intercourse act of June 30, 1834, confers upon the Commissioner of Indian Affairs the only jurisdiction which he possesses in claims for spoliation. That says that if any Indians belonging to any tribe in amity with the United States shall, within the Indian country take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into a State or Territory, and there take or destroy the property of any citizen or inhabitant of the United States, such citizen, of himself or through his agent, may make application to the proper superintendent or agent who, when being furnished with the necessary documents and proofs, shall under the direction of the President, make application to the nation or tribe to which the offenders shall belong for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent or agent to make returns of his doings to the Commissioner of Indian Affairs, that such steps may be taken as shall be proper to obtain satisfaction.

"The practice of this Department seems to have been to require the existence of a treaty between the Government and a tribe of Indians, before they could under its construction be considered in amity, and I am disposed to coincide in that opinion. The Indian tribes are treated with in many respects as if they were independent nations, and if so considered they could not be termed strictly and legally in amity with us without those formal steps. If that view be a correct one, then of course I have no jurisdiction, as no articles of agreement and convention were ever entered into with these Indians. Moreover, it does not appear that these claims were ever submitted to the Indians in council, that they might be heard in their defense. It may be said that in the condition of affairs, that would have been a mere formality, resulting in nothing if there were no obstacles to prevent its being done altogether; but the law demands that it shall be done, and as an executive officer I have no equity power to give relief against its positive requirements. There is another requirement that seems not to have been fulfilled; it nowhere appears that the parties claimant have never sought private satisfaction or revenge for the injuries inflicted upon them. Believing, as stated above, that I have no jurisdiction over these cases, as presented, I beg leave herewith, to return the papers.

"Respectfully, etc.,

"A. B. GREENWOOD,

"*Commissioner.*

"HON. W. K. SEBASTIAN,

"*Chairman Senate Committee on Indian Affairs.*"

EXHIBIT G.

Appropriations to pay for destruction of or damages to property in war, 1792–1845. See *ante*, p. 48.

I. General Acts.

Act of April 9, 1816 (3 Stat. L., 261).

"An act to authorize the payment for property lost, captured or destroyed by the enemy while in military service of the United States and for other purposes. * *

"Sec. III. *Be it further enacted,* That any person who, in the late war aforesaid, has sustained damage by the loss, capture or destruction, by an enemy, of any horse, mule, ox, wagon, cart, boat, sleigh, or harness, while such property was in the military service of the United States, either by empressment or contract, except in cases where the risk to which the property would be exposed was agreed to be incurred by the owner, if it shall appear that such loss, capture or destruction was without any fault or negligence on the part of the owner; and any person who, during the time aforesaid, has sustained damage by the death of any such horse, mule or ox, in consequence of the failure on the part of the United States to furnish the same with sufficient forage, while in the service aforesaid, shall be allowed and paid the value thereof. * * *

"Sec. V. *And be it further enacted,* That where any property has been impressed, or taken by public authority, for the use or subsistence of the army, during the late war, and the same shall have been destroyed, lost or consumed, the owner of such property shall be paid the value thereof, deducting therefrom the amount which has been paid, or may be claimed, for the use and risk of the same, while in the service aforesaid. * * *

"Sec. IX. Any person who, from the time aforesaid has sustained damage by the destruction of his or her house or building by the enemy while the same was occupied as a military deposit under the authority of an officer or agent of the United States, shall be allowed and paid the amount of such damage, *Provided,* It shall appear that such occupation was the cause of its destruction."

Act of March 3, 1817 (3 Stat. L., 397).

"An act to amend the act 'authorizing the payment for property lost, captured or destroyed by the enemy while in the military service of the United States, and for other purposes,' passed the ninth of April, one thousand eight hundred and sixteen.

"That the ninth section of the act entitled 'An act authorizing the payment for property lost, captured or destroyed by the enemy, while in the military service of the United States, and for other purposes,' passed on the ninth of April, 1816, shall be construed to extend only to houses or other buildings, occupied by on order of an officer or agent of the United States as a place of deposit for military or naval stores or as barracks for the military forces of the United States. * * *

"Sec. IV. And be it further enacted, That the provisions of this act, and the act to which it is an amendment, shall be, and are hereby extended to cases of property lost, captured or destroyed, in the wars with the Indian tribes, subsequent to the 18th day of February, and prior to the first of September, 1813, in the same manner as if lost, captured or destroyed, in the late war with Great Britain."

Act of March 3, 1825 (4 Stat. L., 123.)

"An act further to amend the act authorizing payment for property lost, captured or destroyed, by the enemy, while in the military service of the United States, and for other purposes, passed ninth April, one thousand eight hundred and sixteen.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person having a claim for a building destroyed by the enemy during the late war, under the ninth section of the act to which this is an amendment, and of the act to amend the same, passed the third of March, one thousand eight hundred and seventeen, which shall have been presented to the Commissioner of Claims, appointed under the act first aforesaid, at any time before the tenth of April, one thousand eight hundred and eighteen, and which was not paid under said acts, nor finally rejected by said Commissioner, may, within nine months hereaf-

ter, present the same with the evidence to support it, to the Third Auditor of the Treasury, for examination and adjustment, and if he shall be satisfied the building or buildings for which damages are claimed was, at the time of its destruction, occupied by order of an agent or officer of the United States, as a place of deposit for military or naval stores, or as barracks for the military forces of the United States, he shall proceed to assess the damages, and certify the amount for payment, in the way pointed out in the act first above referred to, which shall be immediately paid out of any money in the Treasury not otherwise appropriated."

II. Special Acts in Cases Apparently within the Foregoing General Acts:

Claimant.	Date.	Stat. L.	Page.
John Guest, house burned by the British in 1813, to be adjusted upon principles of acts of March 3, 1825, same as though application made under act April 9, 1816	Mar. 3, 1829	6	400
Joel Byington	Jan. 30, 1830	6	403
Ezra Thurber and representatives of Gideon King	Feb. 27, 1830	6	406
Jean Baptisie Conture	Apr. 7, 1830	6	411
Elisha Ives, captured by enemy	May 29, 1830	6	442
Owners of ship "Alleghany," captured by enemy	May 29, 1830	6	442
Eber Hubbard, boat captured by enemy	Mar. 7, 1832	6	478
Samuel Wagstaff, destroyed by enemy	Mar. 7, 1832	6	478
Geo. J. Knight, captured and destroyed by enemy	May 25, 1832	6	489
Samuel May, house burned by enemy	July 14, 1852	6	519
Robert Kane, equipments captured	Mar. 2, 1833	6	544
Whitford Gill, boat captured	May 1, 1834	6	559
Aaron Bellamy, captured by enemy while in service of the U. S. contrary to will of owner	June 19, 1834	6	564
Henry and Robert Sewell, property destroyed by enemy	June 30, 1834	6	585
James Tilford	Feb. 17, 1836	6	622
Jacob B. Gilbert, destruction of house used by military	Feb. 17, 1836	6	625
Charles M. Frazier	June 23, 1836	6	642
Michael Fenwick	July 1, 1836	6	661
Representatives of Nathaniel Canada, burned by the British	July 2, 1836	6	669
Benj. H. Mackall, destroyed by British	Mar. 19, 1838	6	707
Richerd Frisby, " " "	July 7, 1838	6	743
Michael Fenwick " " "	Mar. 3, 1839	6	759
Sylvester Phelps and heirs Chas. Landon, destroyed in consequence of its occupation by U. S. troops	Aug. 26, 1842	6	866
James Tongue and others, house burned by British	May 17, 1824	6	300
William T. Nimmo, destroyed by enemy			

III. Special Acts Paying for Damage and Destruction Either by the U. S. Forces or by the Enemy not Apparently Within the Foregoing General Acts.

Claimant.	Troops.	Date.	Vol.	Page.
Grammer School, Wilmington, Del.	U. S.	Apr. 13, 1792	6	8
Certain citizens.	Insurgents in Western Pa.	Feb. 27, 1795	6	20
Rhode Island College.	U. S. Troops	Apr. 16, 1800	6	40
Certain persons.	Captured or destroyed by enemy in Detroit	Aug. 2, 1813	6	125
William Robinson *et al.*	U. S. Troops	Jan. 28, 1815	6	146
Jacob Shimrick & Schoultz & Vogeler of Christian Chapman and representatives of John Calef.	U. S.	Feb. 27, 1815	6	150
William H. Washington.	U. S. officers	Mar. 1, 1815	6	151
Caleb Nichols.	Order Gen. Macomb	Mar. 3, 1817	6	194
Jas. H. Boisgervais.	Order Gen. D. B. Morgan	Mar. 3, 1817	6	195
William Oliver.	Order Commander Ft. Wayne	Mar. 3, 1817	6	196
Samuel F. Hooker.	Destroyed by enemy	Apr. 20, 1818	6	211
Mottrom Ball.		Jan. 19, 1819	6	217
Daniel Renner & N. H. Heath.		Feb. 16, 1819	6	221
Michael Hogan.	U. S. Troops.	Mar. 3, 1819	6	231
John Harding and others.	Order Maj. Gen. Thomas.	Apr. 5, 1820	6	239
Elias Parks.	Destroyed by British	Dec. 29, 1820	6	254
Rosalie P. Deslonde.	U. S. Troops.	Mar. 2, 1821	6	258
John Rodrequez.	" " "	Mar. 2, 1821	6	259
Francis B. Languille.	" " "	Mar. 2, 1821	6	259
Alexander Milne.	" " "	Mar. 2, 1821	6	259
Lewis B. Guerlain.	" " "	Mar. 2, 1821	6	259
Joseph M. Meil.		Mar. 2, 1821	6	259
Bartholomew Duverge.	" " "	Mar. 2, 1821	6	260
Pierre Dennie De LaRonde.	" " "	Mar. 2, 1821	6	260
Anacostia Bridge Co. (destruction of bridge)		Mar. 3, 1815	6	153
Thomas Sprigg.	Order Gen. Foreman	Mar. 3, 1815	6	155
Sundry persons (tools destroyed when Navy Y'd burned).		Mar. 3, 1815	6	155
James Savage *et al.*	Order Gen. Macomb	Mar. 3, 1815	6	155
William Flood.	British	Mar. 3, 1815	6	163
Joseph Wilson.	A Sentinel	Apr. 26, 1816	6	165
Washington Bridge Co.	Order U. S.	Apr. 26, 1816	6	168
Samuel Manac, a friendly Creek Indian.	Hostile Creeks	Apr. 27, 1816	6	171
Charles Todd.	U. S.	Apr. 27, 1816	6	171
Taylor & McNeal & others.	United States	Apr. 27, 1816	6	172
Jabex Mowry and others.	Enemy	Apr. 29, 1816	6	175

Claimant.	Troops.	Date.	Vol.	Page.
Representatives of Ignace Chalmet Delino & Anthony Cruzat & L. P. Deverges.	Maj. Gen. Jackson	Mar. 1, 1817	6	186
Madam Montriuel.	" " "	Mar. 3, 1817	6	187
Peter Caslard.	Order Gen. D. B. Morgan	Mar. 3, 1817	6	188
Certain Creek Indians.	Hostile Creeks	Mar. 3, 1817	6	191
Peter Kindall.	Capture by British	Mar. 3, 1817	6	193
Joseph I. Green.	Order Gen. Macomb	Mar. 3, 1817	6	193
John Anderson.	Burned while occupied by U.S. troops	Apr. 17, 1822	6	264
James May & representatives of Wm. Macomb.	U. S. Troops.	May 1, 1822	6	266
William Henderson.	Destroyed by enemy	May 7, 1822	6	268
Heirs Edw'd McCarty.		May 7, 1822	6	270
Solomon Prevost.		May 7, 1822	6	273
Thomas Shields.	Order Lieut. Jones, U. S. N.	May 7, 1822	6	274
John Pellet.		May 7, 1822	6	277
Eleanor Lawrence.	U. S. Troops	Mar. 3, 1823	6	282
Samuel Walker *et al.*	" " "	Mar. 3, 1823	6	284
Elijah Brush.	" " "	May 17, 1824	6	300
David Cooper.	" " "	May 17, 1824	6	301
David Gaffin & Sam'l Hoag.	" " "	May 18, 1824	6	303
Lemuel Arnes.	" " "	May 18, 1824	6	304
Joseph Dozet & Antonie Bourgard.	Order Col. John Anderson, U. S. A.	Mar. 3, 1825	6	323
Sarah Shillito.	Destroyed while occupied by U. S. troops	Mar. 3, 1825	6	325
Elizabeth City Parish, Va.	U. S. Troops	Feb. 11, 1830	6	404
Joseph Dixon.	" " "	Feb. 11, 1830	6	404
John Rodrignez.	" " "	Apr. 7, 1830	6	412
Representatives of Widow Dupre.	" " "	Apr. 29, 1830	6	438
Sundry vessel owners.	U. S.	May 29, 1830	6	447
John Baptiste Jerome.	U. S. Officer	May 31, 1830	6	449
Gabriel Godfrey.	" " "	May 31, 1830	6	450
Benj. S. Smoot.	" " "	Mar. 3, 1831	6	466
Jane Meier.	U. S. Troops	Mar. 7, 1832	6	478
Silvia Posner.	Burned while occupied by troops.	July 14, 1832	6	513
Dob Carlos Dehault.	Money taken at capture Baton Rouge	July 14, 1832	6	513
Representatives of Ed. Barry.	Burning of Navy Yard, D. C.	July 14, 1832	6	520
Augustine Taney.	Destroyed by enemy	July 14, 1832	6	525
Henry Waller.	Destroyed by enemy	July 14, 1832	6	525
Representatives of Geo. Hodge	Burning of Navy Yard, D. C.	Mar. 2, 1833	6	545
Joshua P. Frothingham & heirs of Thos. Hopping.	Gen. Putnam	Mar. 2, 1833	6	546
Widow Robert Avert.	U. S. Troops	Jan. 24, 1834	6	552
Joel Byington.	" " "	June 26, 1834	6	568

Claimant.	Troops.	Date.	Vol.	Page.
Representatives of John Rose, Sr.	Property destroyed at Navy Y'd, D. C., 1813.	June 30, 1834	6	594
Representatives of Aaron Smith.	U. S. Troops	Mar. 3, 1835	6	617
John J. Avery.	" " "	Mar. 3, 1835	6	618
William Baker.	" " "	Feb. 17, 1836	6	623
Rep's of Thomas Beacham.	By the British	Feb. 17, 1836	6	626
Heirs William Forbes.	By enemy	July 1, 1836	6	660
Albion T. Crow.	Accidentally burned by U. S. troops	Mar. 2, 1838	6	705
Frances Gardiner.	U. S. Troops	Mar. 7, 1838	6	710
Allen R. Moore.	" " "	Mar. 7, 1838	6	706
William Eadus.	Burned by British	Apr. 6, 1838	6	710
Curtis Grubb.	U. S. Troops	Apr. 20, 1838	6	716
John T. Addoms, exr.	" " "	May 8, 1840	6	799
John King.	British	Aug. 26, 1842	6	865
John H. McIntosh.	A military officer under due authority	Mar. 3, 1845	6	941

IV. Indian Treaties.

By treaty of Sept. 29, 1817, Art. XII, 7 Stat. L., 165, with the Wyandots, the United States agrees to pay $14,480.13 to Indians who adhered to the United States during the war with Great Britain, for injury to or destruction of their property.

By treaty of March 17, 1842, Art. XVI, 11 Stat. L., 583, with the Wyandots, the United States agrees to pay for the destruction by the enemy of the property of a citizen of the United States intermarried with the Indians.

Office Supreme Court U. S.
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CLERK.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1895.

No. 413.

ALVIN C. LEIGHTON,

Appellant,

vs.

THE UNITED STATES, ET ALS.,

Respondents.

Brief of JOHN B. SANBORN,
Of Counsel.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1895.

ALVIN C. LEIGHTON,

Appellant,

vs.

THE UNITED STATES, ET ALS.,

Respondents.

No. 413.

Brief for Appellant.

Was the Ogallalla Band of the Sioux tribe of Indians "in amity" with the United States as matter of law on the 10th day of April, 1867, is the question to be considered and decided in this case. To determine the question the action of both the legislative and executive departments of the government must be considered.

This question necessarily involves the further question, as to the distinctions, if any, which exist between free and independent states and dependent domestic states. "Independent states have full power to levy war, conclude peace, contract alliances, establish commerce, and do all

other acts and things which independent states may of right do," as expressed by Mr. Jefferson in the Declaration of Independence. We respectfully submit that domestic dependent states have not the power to do any of these things without the assent and approval of the independent superior power, while with that assent, and as the joint action of the dependent and independent powers, all those things may be done. If a domestic, dependent Indian tribe or band should commence hostilities and make war upon a neighboring state to the United States, Mexico or Canada, would not this for the very reason that the United States is the superior power involve the United States, and would not the United States have the power and authority to determine whether war should exist between the foreign power and the United States, as the result, or whether their relations should be those of amity and the hostilities and operations of the Indians be resisted and suppressed either by the treaty or war making power of the United States? Can the case be different where the dependent nation attempts to make war on the people of the United States? Must not the United States ultimately determine whether the relations between the two powers shall be that of amity or war? In the case of the Ogallalla band at the time referred to, the United States as will be seen by the act of congress hereinafter referred to, simply turned the eyes of the Indians to its war making power, but closed out all the disturbances and established peace by the treaty making power and did not permit the relations of amity between the Indians and the citizens of the United States, and the United States as a government, to be broken or suspended for a single day.

The Ogallalla band and the United States were in treaty relations. Pages 747 and 748, vol. 14, U. S. Statutes at Large. The principal stipulations of the treaty provided that the Indians of said band individually and collectively should cease all hostilities against the persons and property of the citizens of the United States, and use their physical force to prevent other bands of the Dakota Indians from making hostile demonstrations against the government or people of the United States. No cession was made by said treaty of any territory, other than an agreement by the said band to "withdraw from the routes overland already established or hereafter to be established through their country." The United States agreed to pay to said band the sum of ten thousand dollars annually for twenty years, and the said band obligated itself to be subject to the exclusive jurisdiction and authority of the United States. This treaty left said band of Indians in the absolute possession and control of all lands previously and then occupied by them, which included all the country west of that occupied by the Brule, Sans Arcs, and Minneconjou bands to the summit of the Big Horn Mountains, of which the court will take judicial notice. The said treaty was confirmed by the senate March 5th, 1866, and became a part of the law of the land. On the 26th day of July, 1866, congress made provision for carrying the stipulations of the treaty into effect on the part of the United States. See page 274, Vol. 14, U. S. Statutes at Large:

"For first of twenty installments to be paid in such articles as the Secretary of the Interior may direct as per fourth article of the Treaty of October 28, 1865, for the fiscal year ending June 30, 1867, ten thousand dollars."

This provision follows the language used at the commencement of said act in the following words:

"That the following sums be and they are hereby appropriated, out of any money in the treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian department and *fulfilling treaty stipulations with various Indian tribes.*"

U. S. Statutes at Large, Vol. 14, page 255.

By the Act of March 5, 1867, congress made further provision for the fulfillment of said treaty on the part of the United States by the following provision:

"For second of twenty installments to be paid in such articles as the Secretary of the Interior may direct as per fourth article of the Treaty of October 28, 1865, ten thousand dollars.

"For this amount for the Brule and Ogallalla bands of Sioux to to be placed at the disposal of the President to be expended by him or under his direction in such manner as will best tend to sustain peaceable relations with said Indians, thirty-five thousand dollars."

Vol. 14 U. S. Statutes at large, page 508 following the usual formula for appropriating money for the Indian service. See page 492 same volume.

Further provision was made in common with all other bands of Sioux on page 512 Vol. 14:

"For the general incidental expenses of the Indian service in Dakota Territory, presents of goods, agricultural implements and other useful articles, and to assist them to locate in permanent abodes and sustain themselves by the pursuits of civilized life, to be expended under the direction of the Secretary of the Interior, twenty thousand dollars."

See page 512 same volume.

In the act of July 27, 1868, congress made further provision for carrying into effect the said treaty of October 28, 1865, as follows:

"For third of twenty installments to be paid in such articles as

the Secretary of the interior may direct, as per fourth article of the treaty of October twenty-eighth, eighteen hundred and sixty-five ten thousand dollars."

Vol. 15 U. S. Statutes at Large, page 216, and in the same act made the further following provision.

"For the support of one blacksmith, and for tools, iron, and steel and other articles necessary for the blacksmith shop in conformity with the same article of the same treaty, one thousand five hundred dollars; provided, That in delivering the annuities herein named to the Blackfeet, the Lower Brule, Minneconjou, Onepapas, *Ogallalla*, Sans Arcs, Two Kettles, Upper Yanctonais and Yanctonnais Sioux, if any persons of the said bands shall be permanently absent, the Secretary may withhold such part of said appropriation as may be the proportionate share of said absent persons. And if such absent persons shall be found to be hostile, or provided for under other treaty stipulations with the government, the Secretary may use the proportion of the appropriation due to such part of said bands for the benefit of other of said bands by the purchase of stock, provisions, clothing, and agricultural implements."

"For expenses of transporting and delivering articles purchased for the several bands of Sioux Indians, parties to treaties made at Fort Sully in October, eighteen hundred and sixty-five, twenty thousand dollars."

Page 217 of the same act.

On the 25th day of May, A. D. 1868, the United States entered into a new treaty with the Ogallalla Band of Sioux in common with all the western bands of Sioux which was confirmed and proclaimed February 24th, 1869, which contained among other provisions the following, being article seventeen:

"Article XVII. It is hereby expressly understood and agreed by and between the respective parties to this treaty, that the execution of this treaty and its ratification by the United States Senate shall have the effect and shall be construed as abrogating and annulling all treaties and agreements heretofore entered into between the respective parties hereto, so far as such treaties and agreements obligate the United States to furnish and provide

money, clothing or other articles of property to such Indians and bands of Indians as become parties to this treaty, but no further."

Vol. 15, U. S. Statutes at Large, page 640.

On the 20th of July, 1867, congress passed the act to establish peace with certain hostile Indian tribes, Vol. 15, U. S. Statutes at Large, page 17. No appropriation was made by said act to carry on war and four hundred and fifty thousand dollars was thereby appropriated by congress to establish and maintain peace by providing a commission and vesting it with power and authority to call together the chiefs and headmen of such bands or tribes of Indians as were then waging war against the United States or *committing depredation on the people thereof*, to ascertain the alleged reason of their acts of hostility, and in their discretion, under the direction of the president to make and conclude with the said bands or tribes, such treaty stipulations subject to the action of the senate as may remove all just causes of complaint on their part, and at the same time establish security for person and property along the lines of railroad now being constructed to the Pacific and other thoroughfares of travel to the western territories, and such as will most likely secure civilization for the Indians and peace and safety for the whites. U. S. Statutes at Large, Vol. 15, page 17.

This act of congress and the treaty made with the Sioux nation in pursuance thereof, April 29, 1868, proclaimed February 24, 1869, established new relations, and provided a general national policy to be pursued by the United States and by said Indians, parties to said treaty, towards each other, and superceded so far as the obligations of the United States were concerned, all the stipulations of preceding treaties.

It will be seen by Section five of the act of July 20, 1867, that congress was still postponing making war, or making a declaration of war, general or special, solemn, or limited against said Indians. The language of Section five is as follows, viz:

"That if said commissioners fail to secure the consent of the Indians to remove to the reservations, and fail to secure peace, then the Secretary of War, under the direction of the president, is hereby authorized to accept the services of mounted volunteers from the governors of the several states and territories in organized companies and battalions, not exceeding four thousand men in number, and for such term of service as in his judgment may be necessary for the suppression of Indian hostilities."

The claim of the appellant is that from the foregoing it conclusively appears, that from October 28, 1865, the legislative department of the government was in amicable treaty relation with the Ogallalla band of Indians, and from the date of the treaty of 1865 to that of the treaty of 1868 complied with all the obligations of the treaty on the part of the government, and at no time by any act or any failure to act gave any intimation that the treaty relations were suspended. During the same time this band of Ogallallas received its annuities as they were appropriated by Congress, and as a matter of fact a large village of them under the Chief Big Mouth remained in camp in the immediate vicinity of Ft. Laramie.

At no time did the President or Secretary of War authorize any hostilities against said Indians, and the hostilities that occurred, and the blood that was shed resulted wholly from a misconstruction or a misconception by one or both parties to the treaty of 1865, of the following language used in said treaty:

"The band represented in council shall withdraw from the

routes overland already established or hereafter to be established through their country;"

the Ogallallas construing the language to be limited to routes overland running east and west, or nearly so, between the Atlantic and Pacific states, while the officers of the army in that section and the war department construed the language as giving the right to open a road or route from North Platte along the base of the Big Horn mountains to Bozeman in Montana. The Indians resisted this construction, and made hostile demonstrations along this route only. This led to the Ft. Fetterman massacre directly on the route, and the commission appointed under the act of 1868, were compelled to concede that the Indian contention was right, and to abandon the route and the military posts established thereon, and thereby in the language of the act of 1867,

"to remove all just cause of complaint on their part, and at the same time establish security for person and property along the lines of railroad then being constructed."

See article sixteen of the treaty of April 29th, 1868, Vol. 15, U. S. Statutes at Large, page 640:

"The United States hereby agrees and stipulates that the country north of the North Platte river and east of the summits of the Big Horn Mountains, shall be held and considered to be unceded Indian territory; and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same, or without the consent of the Indians first had and obtained to pass through the same; and it is further agreed by the United States that within ninety days after the conclusion of peace with all the bands of the Sioux nation, the military posts now established in the territory in this article named shall be abandoned and that the road leading to them and by them to the settlements in the territory of Montana shall be closed."

This article was carried into effect by the United States

promptly, and security for person and property was established.

This action of the commission was confirmed by the senate and thereby became a part of the law of the land, and an admission by all the people of the United States that the Indians had been contending even unto blood, simply for their legal rights and to maintain the integrity of their territory and their ancient possessions. During this entire time their treaty relations with the United States had not been suspended and both parties to the treaty had acted continuously upon them until a new treaty was entered into. No invasion of the territory occupied by the Ogallalla band, other than the erroneous opening of the route from North Platte to Bozeman. and the establishment of the military posts of Ft. Phil. Kearney and C. F. Smith was authorized or made by the executive department. All the blood that was shed was shed on this route, and about these unauthorized military posts established in the Indian country without the consent of the Indians. The Ogallallas made no war upon the people of the United States, and attacked only such troops and persons as they found on and along this route, and around these posts. It is evident that the United States as a government acting through its legislative and executive departments had not fully considered and decided the question whether the route should be opened or not, as by the act of 1868 creating the commission, it directed the commissioners to ascertain the causes of the disturbances and remove them if possible, and if that could not be done then it authorized the mustering into service of volunteers for carrying on war. Hence the relation existing between the Ogallallas band of Sioux In-

dians and the United States during all the time between the execution of the treaty of 1865 and the conclusion of the treaty of 1868 was as a matter of law and fact one of amity and not of hostility, notwithstanding the disturbances along the Bozeman road and around forts Phil Kearney and C. F. Smith, as found by the Court of Claims.

The question whether the Indians, sustaining as they do to the United States the relation of dependent instead of independent nations, could without the concurrence of the United States change an existing relation of amity to one of hostility as a matter of law, deserves and undoubtedly will receive the serious consideration of the court. To concede that any band or tribe of Indians can by either words or acts change the legal relations existing between them and the citizens of the United States and give to every citizen of the United States belligerent rights and a position of hostility to said Indians without any action on the part of the government of the United States, is to make a concession that immensely complicates all the rules of action that have heretofore existed between the government and the Indian tribes.

This Court has said that:

> "It must also be conceded as a general rule to be one of the immediate consequences of a declaration of war, and the effect of a state of war, even when not declared that all commercial intercourse and dealings between the subjects or adherence of the contending powers is unlawful, and is interdicted, and places every individual of the repective governments as well as the governments themselves in a state of hostility."
>
> *Mathews* v. *McStea*, 91 U. S. Page 9.

From the foregoing statement it will appear that the United States continued in amicable relation with the

Ogallallas, made annual appropriations as provided by the treaty of 1865, and expended the same for their benefit, in no way modified or interfered with the trade and intercourse laws governing trade and commerce between said Indians and the whites, and during all the time dealt with said Indians that were disorderly in the some manner that they would deal with citizens in insurrection or with mobs disturbing the peace. Is it not true that the legal rights and obligations of our citizens toward the Indian bands and tribes are fixed and determined by our public statutes and treaties, and that our citizens on the frontier having property captured or destroyed by Indians have a right to look to the United States for ultimate indemnification until the legislative department by a statute, or the executive department, either by acts or proclamations, show to all the world that amity no longer exists and that a state of war does exist. Can the United States be in amity with the Indians, and the Indians not be in amity with the United States? We insist that while the treaties, laws and dealings of the United States, with the Ogallalla band, are those of one nation in amity with another that the legal rights of the citizens of the United States are the rights resulting from a condition of amity, and not from a condition of war. In this case there has been no declaration of war against the Ogallallas by Congress, but an indication that war might ensue, if their conduct was not changed. There has been no proclamation of war by the president, and no act of war as defined by international law on the part of the United States unless the attempt to open the Bozeman road and establish Forts Phil Kearney and C. F. Smith, was such, and from this act the government receded as

shown by article 16 of the treaty of April 29, 1868. This was not an act of war as no unauthorized invasion of territory was intended and the same was the result of misconstruction of treaty provisions.

We insist that the erroneous constructions of the terms of a treaty made in good faith, and action based upon that construction is not of itself an act of war; certainly not when the offending power immediately upon its attention being called to its error abandons such construction and corrects the error, and that the resistance even unto blood by the other party to the treaty, of the acts resulting from the erroneous construction in the territory of the aggrieved party, is not an act of war. The peace may be disturbed, but the condition of amity between the two powers is not changed. War does not exist while amity does.

The case between the United States and the Ogallalla band in 1866 and 67 stated most favorably for the United States, was simply an issue of law as to the proper construction of the language of the treaty of 1865 pertaining to routes of travel. The question remained open until it was adjusted by the treaty and its confirmation of 1868, and the contention of the Ogallalla band as to its construction was fully conceded. While these two powers were carrying on these negotiations, communicating and dealing with each other, the relation as matter of law between them must be one of amity and not of war. Warlike demonstrations, disturbances of the peace and even destruction of property would not change this condition. Congress by the act of 1867 creating the commission, appropriated three hundred thousand dollars to be expended among such of said Indians as did not engage in hostilities.

As a matter of fact it was expended for the equal benefit of all the Ogallalla band in common with the other western bands of the Sioux nation, and demonstrates that Congress maintained open amicable relations with the Ogallalla band all the time between the treaty of 1865, and the treaty of 1868. During all this time the citizens of the United States were prohibited by the trade and intercourse laws from making reclamation of their property lost by the Indians, and from entering into the Indian country, and given no remedy in the law for their losses from Indian depredations and from this results the obligation of the United States to pay for the property lost and destroyed by our citizens by the hands of these Indians during that period. This band like all the other Indian bands is a weak dependent nation, depending on the United States for its continued existence and protection, and the United States alone must determinethe relations which exist at any given period between itself and this band. The obligation of the government to protect its own citizens and the Indian band exists at one and the same time, and its determination and action between the two people is conclusive both upon citizens and Indians. The power to make the relation one of war by the United States is conceded. The fact that between 1865 and 1868 the United States did from its own volition make it, and compel the Ogallalla band to make it one of peace and amity as demonstrated by the treaties, the appropriations and the acts of Congress should not be questioned even though the acts of the Ogallalla band were aggravating and cruel in the extreme.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ALVIN C. LEIGHTON, APPELLANT,
v.
THE UNITED STATES ET AL., APPELLEES. } No. 413.

STATEMENT AND BRIEF OF CHARLES B. HOWRY, ASSISTANT ATTORNEY-GENERAL, FOR THE APPELLEES, ON THE CONSTRUCTION OF THE LAWS AND TREATIES RELATING TO THE DEPREDATIONS OF INDIANS.

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STATEMENT.

This case is one of the series of cases advanced for argument, on the motion of the Government, by the Supreme Court, for the determination of questions arising under what is known as the Indian depredation act of Congress, approved March 3, 1891. Inasmuch as this act contains references to treaties with the Indian tribes, and to numerous acts of Congress, under which many claims were allowed by the Secretary of the Interior, the questions now to be determined relate to the action of the Interior Department and the effect of certain awards made by the Secretary before the Court of Claims

acquired the jurisdiction to hear and determine the cases. The other two appeals are the cases of *Marks and others* v. *The United States and the Bannocks* and *Johnson* v. *The United States and the Utah Tribe*. They differ from the case at bar in that they have never been examined and allowed by the Secretary of the Interior, while Leighton's case had the benefit of such examination and allowance and in that shape went to the court for adjudication. The difference, however, is more apparent than real, as I will attempt to show.

The petition here shows that Leighton was a citizen of the United States, and that on or about the 10th day of April, 1867, he had certain property taken from his possession by the confederated bands of the Sioux tribe of Indians and by the Northern Cheyennes and Arapahoes between Fort Fetterman, Wyo., and Fort Reno, Dak., *the petition alleging that these tribes or nations were then in amity with the United States*, and that said Indians were chargeable with the depredation by reason of a treaty between them and the United States; that a claim for the property, with evidence therein, was presented to the Commissioner of Indian Affairs in March, 1873, and in December of that year was allowed and subsequently reported to Congress (March 27, 1874); that again, on November 29, 1887, the claim was allowed and reported to Congress, but that no other action was ever taken in Congress, or by any of the Departments. The amended petition was filed in the Court of Claims March 3, 1894, in lieu of an original petition, and the case went to final hearing in the court below upon the general traverse

filed on behalf of the United States. On January 7, 1893, the claimant, Leighton, filed an election to reopen the claim as allowed by the Secretary of the Interior, with the statement that he desired to try the same before the court. The election to reopen was accompanied with an averment that the allowance was erroneous in fixing the value of certain personal property named in the petition, with the further statement that "the claimant does not seek to disturb the findings or award of the Commissioner of Indian Affairs and the Secretary of the Interior in any other respect than as above set forth, but admits that the same are correct in all other respects."

The findings of fact show that at the time of the loss the claimant was a post trader or sutler at Fort C. F. Smith and Fort Reno, and owned and possessed the personal property set forth in the findings, and that at the time and place set forth Indians, belonging to the Ogallala band of the Sioux tribe, took and drove away the property; that, at the time of the loss, the Ogallala band of the Sioux tribe was under separate treaty relations with the United States, by treaty dated October 28, 1865, proclaimed March 17, 1866 (14 Stat. L., 747), and were receiving annuities thereunder; that this band, under its principal chief, Red Cloud, was at the time of this depredation in armed hostility against the United States, in resisting the military authorities in the opening of a military road and the establishment thereon of military posts, and maintaining the same, along what was known as the Bozeman road, extending from Fort Laramie in Wyoming to Fort Smith in Montana. The findings show that

the relations of the said band of Sioux Indians to the United States further appeared from the public documents named in the findings, of which the court takes judicial notice. From the facts the court found the ultimate fact, so far as it was a question of fact, that the band committing the depredation was not in amity with the United States at the time.

The findings also show the presentation of the claim and its allowance and the report to Congress by the Secretary of the Interior in 1874; that the claim as thus allowed was also submitted to Congress in accordance with the provisions of the act of March 3, 1885 (23 Stat. L., 376), in a report dated January 20, 1886, as barred, because not filed within three years from the date of the alleged injury as required by section 17 act of 1834 (4 Stat. L., 731); House Ex. Doc. No. 125, Forty-ninth Congress, first session; that the claim was subsequently examined by the Secretary of the Interior under the act of March 3, 1885, and subsequent Indian depredation acts, and reported to the first session of the Fiftieth Congress January 5, 1888, according to House Ex. Doc. No. 34; that after the presentation of the claim in the court below, claimant elected to reopen and try the case under section 4 of the act of 1891. Other findings of fact disclose the practice of the Interior Department in the examination of claims under said acts whenever there was a treaty with the tribe charged with the depredation, and that no discrimination was made in the allowance of claims under said acts between claims where the tribe charged was in a state of peace with, or

engaged in actual hostilities against, the United States; that under such acts the practice of the Interior Department was such that where a treaty existed between the tribe charged with the depredation and the United States the amity of the tribe was not jurisdictional before the Department; that whenever there was a treaty containing provisions substantially similar to those contained in the treaties referred to there was a liability against such tribe, whether the tribe had agreed by treaty to pay such claim or not. The findings show that the Secretary of the Interior reported the allowance of a great number of claims similar to that in the case at bar to Congress, at each session thereof, with a recommendation for payment and the same were printed and laid before Congress, but Congress refused to make appropriations to pay said allowed claims.

Upon all the findings of fact the court below decided, as a conclusion of law, that the Ogallala Sioux were not in amity with the United States at the time of the depredation complained of, and the petition was dismissed, that band of the Sioux being the depredators. Thereupon Leighton appealed.

STATUTES RELATING TO INDIAN DEPREDATIONS.

The statutes relating to the acts of Indians similar to those for which suit has been brought in this case are set forth in full in the appendix to my brief in the case of *Marks et al.* v. *The United States and the Bannocks* (which case is now before the court), and need not be again put in print.

The first statute was the act of May 19, 1796, section 14. (1 Stat. L., 472.) This statute even had an earlier origin, occurring in the preamble to the ordinance of August 7, 1786, passed by Congress before the adoption of the Constitution. (Am. State Pap., Indian Affairs, vol. 1, p. 14.) The act of 1796 was followed by that of March 3, 1799, section 14 (1 Stat. L., 747), and this in turn was followed by that of March 30, 1802, section 14. (2 Stat. L., 143.)

Under the last act the War Department, which then had jurisdiction, seems to have dealt with depredations as synonymous with robberies and thefts of Indians, evidently referring to the acts of Indians occurring in times of peace. No other reasonable inference can be drawn from the course of dealing with the matter at that time, inasmuch as no payments were made from annuities where the Indians were not in amity. (Letter of Hon. W. H. Crawford, Secretary of War, to Congress, March 13, 1816; Am. State Pap. Indian Affairs, vol. 2, p. 27.)

The act of June 30, 1834 (4 Stat. L., 731), was a substantial reenactment of the act of 1802, but by section 8 of the act of February 28, 1859 (11 Stat. L., 401), the United States withdrew its promise of indemnification for property taken or destroyed in certain cases by Indians. The joint resolution of June 25, 1860 (12 Stat. L., 120), was a construction of the repealing act of 1859, in that the repealing statute was not to be so construed as to destroy or impair any right to indemnity which existed in any case at the date of the repeal.

It is evident from the act of 1859 and the joint resolution of 1860 that Congress dealt with depredations

merely as trespasses and as not including the taking and destruction of property where hostilities existed. These acts of Congress expressly refer to "Indians *trespassing*."

The act of July 15, 1870, section 4 (16 Stat. L., 360), forbade the payment of any claim for depredations without special appropriation therefor. This statute has never been repealed. (Vide sec. 2098, Rev. Stat.)

The act of May 29, 1872, section 7 (17 Stat. L., 190), sections 445 and 466, Revised Statutes, was merely a direction to the Secretary of the Interior to investigate claims for depredations under existing laws or treaty stipulations. This act did not enlarge the class of claims which the Secretary was authorized to consider under the act of 1834 (sec. 2156, R. S.), which limited the jurisdiction to claims against tribes in amity.

The act of March 3, 1885 (23 Stat. L., 376), appropriated for the investigation of "certain Indian depredation claims." Under this act the Secretary of the Interior was required to cause a complete list of all claims before that time filed in the Interior Department, approved in whole or in part and then unpaid, and all pending claims not then examined, on behalf of *citizens* of the United States, on account of depredations committed, chargeable against any tribe of Indians by reason of any *treaty* between such tribe and the United States to be made and presented to Congress. This was a departure from previous legislation in that the claims of inhabitants and aliens were excluded from consideration unless they had made themselves citizens at the time of their respective losses.

The act of May 15, 1886 (24 Stat. L., 44), appropriated for continuing the investigation originally authorized by the act of the year before, the examination and report to include claims, if any, barred by statute, but such fact to be stated in each report to Congress.

This brings us to the time Leighton's claim was allowed by the Secretary of the Interior.

The legislation since that time consists of appropriations for continuing investigations originally authorized. (Act of March 2, 1887, 24 Stat. L., 446; act of June 29, 1888, 25 Stat. L., 234; act of March 2, 1889, 25 Stat. L., 998; act of August 19, 1890, 26 Stat. L., 356, and March 3, 1891, 26 Stat. L., 1009.)

Under the act of March 3, 1891 (1 Supp. to R. S., 2d ed., p. 913), the claimant brought his suit in the Court of Claims, alleging the amity of the depredators as required by all the statutes mentioned, thereby recognizing that amity was an essential averment to enable the court to take jurisdiction.

THE ISSUES.

The claimant contends:

(1) That his claim has been "examined and allowed by the Interior Department," and therefore neither amity nor treaty obligation need be found by the court as conditions of its jurisdiction, insisting that the allowance of the claim by the Secretary of the Interior took these questions out of the case.

(2) That a treaty obligation existed with the tribe charged, and therefore amity need not be found as a con-

dition of jurisdiction of the Court of Claims, the treaty being sufficient to fix liability under the act of 1885 and subsequent acts, and justifying the allowance.

(3) That the relations of the Indians were never those of actual war, but that they were merely engaged in depredations.

(4) That war is in its nature a condition political, and that the political departments of the Government did not treat the acts of the Indians as acts of war, or the Government as engaged in war against them.

(5) That if the condition of amity was ever destroyed it was not done until after an actual collision took place between the Indians and our troops on December 21, 1866; and that peace was again resumed when the Indians voluntarily announced their purpose to cease from further depredations in April, 1867.

(6) That upon the transfer of the case from the Interior Department to the jurisdiction of the Court of Claims the court became bound by the Department construction of the acts of Congress under which the Secretary allowed the claim, and that this was so, especially under the last allowance.

In answer to these contentions the Government holds:

(1) That the allowance of the claim under the act of 1872 conferred no rights at all which the act of 1891 recognized in the transfer of the case from the Interior Department to the court; and that this allowance under the act of 1872 gave the claim no advantage and can not be considered for any purpose whatever.

(2) That the allowance of the claim under the act of 1885 was *ultra vires* and in fact was not an allowance,

because the treaty with the Indians charged did not make the depredation chargeable against the tribe, in consequence of which the Department had no jurisdiction to consider the case at all. It was required by the act of 1885 and subsequent acts that the Secretary of the Interior should have found some specific clause in the treaty with the Ogallala Sioux which created an obligation of payment, and that he did not do. The claim was, therefore, one not properly examined and allowed by the Interior Department, and the Secretary, having exercised jurisdiction not granted by the various acts of Congress or based on treaty agreement, his allowance of the claim was a nullity and the case did not, therefore, go to the Court of Claims with any of the rights conferred upon cases properly allowed by the Interior Department.

(3) That while it is true a treaty had been made with the Ogallala Sioux, nevertheless there was no agreement or obligation in the treaty which bound the tribe to pay for the depredations charged against them.

(4) That defendant tribe of Indians was not in amity with the United States at the time of the commission of the depredations charged, but was engaged in open, organized warfare against the citizens and military forces of the United States; that the defendant tribe of Indians was not under treaty relations with the United States at the time the depredations were committed, the treaty having become dissolved by actual hostilities and its obligations no longer in force for any purpose.

(5) That the existence of war or the want of that condition of amity which the statute has prescribed as essen-

tial to be proved before recovery must be determined by the proofs in the case.

(6) That the words "in amity" should be considered as equivalent to a state of peace, and that previous treaty relations are not the equivalent in law to the amity imposed by the statute, but are only presumptive of amity, subject, however, to proof of the actual fact.

(7) That the court was without jurisdiction of the case and could not render judgment because relations of amity were proved to have become broken, and that, outside of the action of the Secretary of the Interior in allowing the claim, the court was bound to hold that the hostility of the defendant Indians at the time of the alleged depredation, if such hostility was shown, was a fact jurisdictional to the Secretary of the Interior as well as to the court, in consequence of which the defense of a want of amity was applicable notwithstanding the allowance.

(8) That the election of the claimant to reopen the award of the Secretary of the Interior reopened the whole case and of necessity imposed upon the court the duty of trying the case *de novo*, without conceding to the claimant the right to so qualify his election to reopen as to exclude the court from the consideration of matters of law as well as of fact.

INTERIOR DEPARTMENT ALLOWANCE OF CLAIM CONSIDERED WITH REFERENCE TO THE STATUTES OF THE UNITED STATES AND THE TREATIES WITH THE SIOUX NATION.

The act of May 29, 1872 (17 Stat. L., 190), sections 445 and 466 of the Revised Statutes, made it the duty of

the Secretary of the Interior to prepare and cause to be published such rules and regulations as he might deem necessary or proper, prescribing the manner of presenting claims arising under existing laws or treaties for compensation for depredations committed by Indians, and the degree and character of the evidence necessary to support such claims. The Department jurisdiction, therefore, extended to claims against both treaty and non-treaty Indians. The Secretary was to investigate all claims presented and to report to Congress the nature, character, and amount of the claims, whether allowed by him or not, *and the evidence upon which his action was based*. There was a proviso to this act that no payment on account of said claims should be made without a specific appropriation therefor by Congress, thus limiting the action of the Secretary to the mere work of examining the facts in claims where laws and treaties then existing authorized the presentation of such claims for payment. These requirements fairly indicate an intention to provide a defense, and the failure to make appropriations for claims allowed by the Secretary under this act also proves that Congress was not sufficiently satisfied with the allowances to make provision for their payment at any time.

The act of 1885 directed the Secretary of the Interior to cause a list to be prepared of all claims of citizens of the United States approved by him in whole or in part, and also all claims pending, but not at the time examined, *chargeable* against any tribe of Indians by reason of any treaty. This was a limitation of the jurisdiction con-

ferred by the act of 1872, since the Secretary's action was confined to claims against Indians in treaty relations. The report of the Secretary was to include, among other things, the date and the clause of the treaty *creating* the obligation of payment and the name, address, and testimony of the various witnesses. Under this act the Secretary was not called upon to pass upon the liability of the United States at all, but his investigations were to be pursued upon the idea that the Indians were chargeable by reason of their treaty obligations. The authority given was simply to examine, ascertain, and report certain facts and conclusions to Congress, the right of final disposition of the case being reserved in Congress.

The secondary liability of the United States was not in any way considered by the Secretary of the Interior, nor, under the law, was he concerned as to the liability of the United States, and the effect of the Department construction, fixing the liability of the Indians under treaty stipulations, can have no place in the determination of the joint liability of the Indians and the Government in the case at bar, inasmuch as the Secretary was not considering the act of 1891, which conditionally imposed liability on the United States.

The court acquired no jurisdiction of the case at bar by virtue of the allowance under the act of 1872, as there is no recognition in the act under which suit is brought of the action of the Interior Department under the laws preceding the act of 1885. The earlier allowances did not even have *prima facie* validity, nor were such claims given priority of consideration. The provisions of the

act of 1885 relating to the investigations superseded the act of 1872, and upon the passage of the act of 1891 allowances under the first statute were ignored altogether.

Neither did the court acquire unconditional jurisdiction of the claim by virtue of its allowance under the act of 1885 and subsequent acts so as to exclude the consideration of those matters made jurisdictional for the investigation of the claim in the first instance and the correction of such errors of law and fact as might be made to appear in any given case. The action of the Secretary in finding a treaty obligation, however, is made the basis of the contention that, by the act of 1891, separate and independent jurisdictions were created. The contention that the jurisdiction of the Court of Claims was acquired by virtue of the allowances appears to be for the purpose of showing that the court took jurisdiction merely because the Secretary had taken favorable action and to exclude the conditions imposed by the first paragraph of the law respecting citizenship and the amity of the defendant Indians at the time of the loss. While citizenship is not involved in this case, the amity of the Ogallalas is involved, and the want of that condition is such, in my view, as to bar any recovery at all.

If claimant's contentions are correct, then the jurisdiction of the court applies to claims arising where Indians were in amity with the United States, for belated claimants, and takes away that condition for those claimants diligent enough to have filed their claims with the Indian Office and to have obtained recognition from the Secretary of the Interior, and also for those claims where, accord-

ing to the Secretary, a treaty with the Indians existed, whether the treaty contained a specific promise to pay for the depredations charged or not. If the language of the act under which this suit is brought justifies the contention of the claimant in this regard, then we have a statute so unequal, discriminative, and partial in character that claims having the same common origin and coming from the same sections of country and governed by the same conditions of fact, are treated by the Government favorably to some and unfavorably to others, without sufficient reason, or even motive, for such discrimination and inequality.

When Leighton's claim was allowed by the Secretary of the Interior, in 1872, the only general law in existence on the subject of Indian depredation claims was the intercourse act of 1834. Section 17 of this act is as follows:

> *And be it further enacted,* That if any Indian or Indians belonging to any tribe in amity with the United States shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent may make application to the proper superintendent, agent, or subagent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong for satis-

faction; and if such nation or tribe shall neglect or refuse to make satisfaction in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or subagent to make return of his doings to the Commissioner of Indian Affairs that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party so injured an eventual indemnification: *Provided*, That if such injured party, his representative, attorney, or agent shall in way violate any of the provisions of this act by seeking or attempting to obtain private satisfaction or revenge he shall forfeit all claim upon the United States for such indemnification: *And provided also*, That unless such claim shall be presented within three years after the commission of the injury the same shall be barred. And if the nation or tribe to which such Indian may belong receive an annuity from the United States such claim shall, at the next payment of the annuity, be deducted therefrom and paid to the party injured; and if no annuity is payable to such nation or tribe then the amount of the claim shall be paid from the Treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal apprehension and punishment of any Indians having so offended. (4 Stat. L., 731.)

This statute constituted the existing law referred to in the subsequent directions to the Secretary of the Interior to investigate claims with the promise of the United States to make indemnity withdrawn. The three years statute of limitations was repealed by its omission from the Revised Statutes in 1873, but all other conditions were left in full force until the act of 1885.

In the act of 1834 we find the word "amity;" that is, to entitle the claimant to compensation for the loss or destruction of property it became necessary to show that the tribe to which the depredating Indians belonged was in amity with the United States. Such is the plain reading of the statute, without reference to the treaty relations of the Indians. It may be admitted that this act was intended to embrace claims against Indians not under treaty relations as well as those under treaty relations, but at the same time it must be said this claimant made no pretense of making application to the proper superintendent, agent, or subagent of the defendant tribe for indemnification. So far as the record discloses, the claimant was silent; nor did the President, as provided by the act, make application to the defendant tribe for satisfaction on any demand whatsoever of the claimant, or otherwise. Hence the defendant Indians had no opportunity of making satisfaction. They had no opportunity to investigate the loss. They had no opportunity of showing that the loss might have been committed by some tribe other than by members of their own tribe. The statute expressly states that if the nation or tribe to which such Indian may belong (the Indian committing the depredation) shall receive an annuity from the United States such claim shall at the next payment of the annuity be deducted therefrom and paid to the party injured, upon compliance, however, on the part of the claimant with the conditions imposed for arriving at the truth of the matter.

There is a proviso that nothing contained in the act should prevent the legal apprehension and punishment of any Indians committing the depredation. It is manifest, therefore, that it was never the intention, without some sort of complaint and some sort of preliminary investigation (which should give the tribe charged with the depredation an opportunity to be heard in its defense), that the Commissioner of Indian Affairs should investigate. The claimant assumes that because he sustained a loss at the hands of persons apparently of Indian appearance and blood he had the right, without complaint or application, to go to the Indian Office and ask for an examination into the amount of his loss upon a mere statement that Indians of a certain tribe were the depredators. It would therefore seem to be proper to say that, before the machinery for an examination into the facts could be set in motion in one of the Departments of the Government upon an *ex parte* showing of the claimant, such claimant should have been required to show that application was made to the proper superintendent, agent, or subagent of the tribe charged, that the tribe might be enabled to defend and put the responsibility where it belonged. Nor must it be forgotten here that Congress legislated on this subject to exclude demands against tribal annuities for the acts of white men personating Indians and marauders taking and stealing property while pretending to be Indian depredators. The whole scheme was a civil proceeding intended to preserve existing relations of peace and friendship.

But, independent of this, the seventeenth section of the act of 1834 expressly provided that if the taking or destruction of the property was certainly done by Indians

satisfaction could only follow in case such Indians belonged to a tribe in amity. The very terms of this law excluded payment for claims where a tribe was hostile. If the Secretary of the Interior did not take this view of the matter, and investigated claims regardless of the amity of the tribe and the other conditions set forth in the existing law, such investigations were unauthorized. Congress paid no regard to the allowances under the act of 1872, except to reject them or to provide for the trial in the Court of Claims of such of them as had received a new examination under the later statutes.

The act under which the final allowance of Leighton's claim was made was merely an act appropriating a small sum of money for the investigation of claims then among the Department files, examined or unexamined, on behalf of citizens *chargeable* against any tribe of Indians by reason of any treaty between the tribe and the United States. The report of the Secretary to Congress was to contain a reference to the date *and clause of the treaty creating the obligation for payment*. The Secretary was authorized and empowered in making such report—

> to cause such additional investigation to be made and such further testimony to be taken as he may deem necessary to enable him to determine the kind and value of all property damaged or destroyed by reason of the depredations aforesaid, and by what tribe such depredations were committed; and his report shall include his determination upon each claim, together with the names and residences of witnesses and the testimony of each, and also what funds are now existing or to be derived by reason of treaty or other obligation, out of which the same should be paid.

If the report of the Secretary of the Interior was intended to be conclusive of the matters referred to him, why was the Secretary required to report the name and residence of the claimant, the name of the Indians, the treaty creating the liability, and the amount of the allowance? Like the requirement in the act of 1872, these directions fairly presupposed an intention to provide defenses to the claims. And the failure of Congress to make appropriations for any of those allowed by the Secretary and reported to that body clearly proves that Congress was not satisfied to take action so extreme as to appropriate for the payment of any of the claims examined by the Secretary. The act of 1891, which provided a method of adjudication in a regularly constituted court of the United States, without creating any new rights, was the logical result of these acts of 1872 and of 1885, under which so many insufficient and unsatisfactory Department allowances of an *ex parte* character had been made.

The name, address, and testimony of the various witnesses could not have been important if Congress had been satisfied with the conclusions of the Secretary. The evidence upon which the action of the Department was based could not have been of any further interest, unless it was to be subject to correction or impeachment or to some test as to its sufficiency.

The claims allowed by the Secretary, in whole or in part, would not have been joined with claims pending, but not allowed, if it had not been that they were alike to be subject to a thorough investigation.

Such claims as had been allowed in whole or in part would not have been confided to the jurisdiction of the court for the mere perfunctory process of rendering judgment, inasmuch as they were intimately connected with claims which had not been allowed and in which the court could not render judgment without the formalities that attend other suits.

What, then, was imposed by the act of 1891? And what was the intention in providing a remedy; in creating a tribunal, and in providing proper defenses?

The refusal of Congress to pay the allowed claims, and the creation of a court to hear and pass upon their validity, is reasonably sufficient to show that it was intended that claims of every character should run the gauntlet of the court upon the same principles and in the same general way as to trial that every other claim against the United States in the court was required to be adjudicated. That is, every defense, whether of law or of fact, was available to the defendants if properly presented.

The effect of allowance under a treaty on the facts was simply to raise a presumption of the validity and the justice of the claim and to give preference of consideration to all such cases in which the presumption had attached. But where any legal defenses existed the Government might reopen; or where a claimant was dissatisfied, he might do so. If the findings were attacked by the Government the presumption still attached, because the burden of proof was in such case put upon the Government, and here, in the provision of the act of March 3, 1891, giving priority of consideration to allowed claims, for the first

time the claims that had been allowed and the claims that could have been with the same authority allowed separated and parted company. They were joined in the same clause in the act of 1885, and they are joined in the same clause in the second paragraph of the first section of the act of March 3, 1891, transferring their consideration to the court; they are separated and distinguished in the jurisdictional act of 1891 only when it comes to precedence in the time of such consideration.

The claimant insists that the jurisdiction of the Court of Claims was complete because a treaty obligation existed on the part of the Indian defendants. The treaty of Fort Laramie of September 14, 1851 (Rev. Ind. Treaties, p. 1048; Laws Relating to Indian Affairs, 1884, p. 317), and an earlier treaty between the United States and the Sioux Indians of June 22, 1825, and July 5, 1825 (7 Stat. L., 250, 252, 257), were referred to as being the foundation of the allowance of the Secretary of the Interior in connection with the treaty between the United States and the Ogallala band of Dakota or Sioux Indians made October 28, 1865. (14 Stat. L., 747.)

The appeal to the ancient treaty of 1825, and the Fort Laramie treaty of 1851, to sustain the action of the authority assumed by the Secretary in allowing this claim, is something of a confession that the last treaty was not sufficient to justify the allowance. The claimant says that if the defendant Indians can not be charged under the treaty of 1865, they are certainly chargeable under the treaties of a former date. But these treaties had been abrogated by repeated wars, and, of course, super-

seded by the later treaty of 1865, if there was such a treaty. War supersedes treaties and makes the subjects of contending sovereignties enemies in law. (*Valk* v. *The United States et al.*, 29 C. Cls. R., 62.) Previous agreements can not be appealed to to uphold obligations which have been abrogated by war, and where, upon the return of peace, the parties have made a new treaty carrying different obligations.

Independent of this, the treaty of 1851 was never ratified or promulgated, and its provisions can not form the basis for the allowance of any claim. If this treaty ever became operative for any purpose it ceased to be so in 1866. (Rep. Sec. of Int., 1869, p. 500.)

Nor can the claimant do that which the Secretary of the Interior failed to do, for the allowance of Leighton's claim was rested by the Secretary entirely upon the treaty of 1865, according to his report in House Ex. Doc. No. 34, of the first session of the Fiftieth Congress. The claim is there reported as No. 1187, at page 16 of the report.

In considering the question of jurisdiction the test is: Was there an agreement to make compensation? If there was not, then the examining officers had no jurisdiction.

The only treaty under which there could have been an examination of Leighton's claim was the Ogallala treaty of 1865. Its obligations are claimed to exist in the first section, as follows:

> The Ogallala band of Dakota or Sioux Indians, represented in council, hereby acknowledge themselves to be subject to the exclusive jurisdiction and authority of the United States, and hereby obligate

> and bind themselves, individually and collectively, not only to cease all hostilities against the persons and property of its citizens, but to use their influence and, if necessary, physical force to prevent other bands of the Dakota Indians or other adjacent tribes, from making hostile demonstrations against the Government or people of the United States.

This obligation covers the promise to cease all *hostilities* against the persons and property of citizens of the United States. Nothing is said about the reimbursement or payment of citizens sustaining losses at the hands of marauders and trespassing Indians. There is a general agreement to keep the peace. That is not such an obligation as authorized the Secretary to act. There is no agreement for the payment of damages on account of depredations of individuals of the tribe. Nothing is said about the malicious or willful trespasses of its individual members. This case is therefore within the principle that—

> While Congress might be willing to trust the Department with the decision of the question of fact, whether a depredation had been committed and the application of a plain provision of a treaty agreeing to pay for such depredation, it does not follow that they were submitting to the decision of the Department the question of allowance founded upon the general provision of the treaty and arising from construction, and not from express stipulation. (*Mares, admr.*, v. *The United States et al.*, 29 C. Cls. R., p. 205.)

Hostilities mean one thing, depredations another. Hostility is the antithesis of the relation of peace. When

used in treaties hostility is the equivalent of political enmity. The origin of the term is from *hostis*, thereby meaning political enmity. The depredations of Indians for which the law provided meant their *trespasses* on white men. All the legislation relating to the depredations of Indians on white men sprang from section 14 of the act of 1796, and was continued in section 17 of the trade and intercourse laws (*supra*), which restricted the obligation of Indians to their acts committed during a time of peace. The act of February 28, 1859 (11 Stat. L., 401), was a legislative construction of the act of 1834, that the taking or destruction of property of white men by Indians, for which annuities were chargeable, were merely trespasses. This view of the national legislature was repeated in the joint resolution of June 25, 1860 (12 Stat. L., 120); and finally, when the act of March 3, 1891, was under discussion in the Senate of the United States, Mr. Turpie, of Indiana, clearly explained the meaning of depredations, and no one controverted his view of the matter. (Cong. Rec., vol. 22, Fifty-first Congress, second session, p. 2908.) If, then, the action of the Secretary, in passing upon this claim, was *ultra vires*, his report to Congress that the claim was allowed under treaty was not such an allowance as comes within the act of 1891.

It has been said, however, that it is not necessary to decide exactly where the line is to be drawn between matters essential to the Department jurisdiction and those confided to the Secretary's discretion, and that it is very moderate to claim that the matters absolutely essential extend no further than the pendency of a claim, and that

when a pending claim was found the Secretary had power to decide it. In line with this contention it is said that the Secretary must be deemed to have had authority to hear and determine those questions upon which Congress required an opinion from him, because his error in these was subject to correction by Congress; and that the courts must hold that whether there was a treaty obligation or not the decision of the Secretary that there was a treaty obligation was not the ministerial act of that official, but within executive discretion, and his action was final on the point of his jurisdiction.

It may be admitted that there was a distinction between the various matters requisite to an allowance, but equally asserted that some of these matters were jurisdictional, which, if decided wrongfully, nullify the allowance; and that with respect to other matters the Secretary had discretion, which, if decided wrongfully, were the subject of mere correction. Under the former proposition may be classed citizenship and treaty obligation and amity; under the latter, those things relating to the kind and value of the property taken, the tribe committing the depredation, the funds available for payment, and matters of a like character. The Department assumption of jurisdiction did not create the right to hear and determine. The statute defined his powers too clearly. If the errors in the record prove that the Department had no jurisdiction, or that the allowance was beyond its power, the action of the Department was void.

For what is jurisdiction but the power to hear and determine the subject-matter of the controversy between the parties? The Secretary's action in making every award

was analogous to that of a court rendering a judgment or decree. In such case where the law confers the power then there is jurisdiction; without the power to hear there is not. The Secretary's jurisdiction was one of limited and special character over the case at bar. His action must necessarily have been confined in allowing claims to the particular cases and parties over which the laws had authorized him to act, and in proceeding without the limits prescribed the Secretary's action was *coram non judice* and void. His jurisdiction did not depend upon his mere act in declaring that the conditions to jurisdiction existed, but upon the actual existence of the facts. These principles have ever been held by this court and by all courts, and they take rank as maxims of the law. (6 Wall., 247; 16 Wall., 414; 10 Wall., 315; 10 Pet., 474.)

Wherever there are errors in the record proving that there was no jurisdiction or that the judgment rendered was beyond the power of the court to render it, the judgment or decree will be disregarded, even where introduced collaterally as evidence of title in another suit between the parties. (10 Wall., 315, *supra*.) See also *Elliott* v. *Peirsol* (1 Pet., 340); *In re Sawyer* (124 U. S., 220).

In *Cooper* v. *Reynolds* (10 Wall., 308) this court has declared it is as easy to give a general and comprehensive definition of the word *jurisdiction* as it is difficult to determine in a special case the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the *res*, or property, in contest, and to the authority of the court to render the judgment or decree which it assumes to make.

It is said that the first section of the Ogallala Sioux treaty creates the obligation for payment. This is a strained interpretation, not based on the language of the obligation, and not inferable from the treaty at all. The Secretary had no right to inject into the obligation that which the parties themselves had not contracted for, and claim jurisdiction, and on certain facts establish liability. Our defense is just as strong in showing the absence of all authority for action, as in those cases where the law requires the petition of a requisite number of freeholders as preliminary to laying out highways and the necessary number do not petition, or in those where municipalities are sought to be held liable by implication on bonds issued outside of the letter of the statute. Tribal liability was never meant to rest on a mere agreement to cease hostilities and maintain peaceable relations, and it is unreasonable to say that the act of 1891 authorized judgment against a tribe in any case based on treaty agreement, unless that treaty expressly authorized the annuities to be withheld for the acts of individual members of the tribe in a state of peace, and in strict compliance with the requirement of the treaty for the ascertainment of liability; and no opinion or Department practice in allowing a claim without an express agreement to pay could fix the liability.

The plea that the Indians are liable where they break the terms of the treaty, as it is claimed the Ogallala Sioux did with reference to the treaty of 1865, assumes too much to reach the conclusion that there is liability. There is no proof that the Sioux broke the treaty any

more than there is that the United States broke it. Who is to prove that the Sioux were the violators or that they had no wrongs which they could or should not redress by war? Nor was it ever contemplated that the Court of Claims should sit in judgment upon the right of any tribe of Indians to begin a war and prosecute it with all the force it could.

It has been urged that the only defenses which any tribe can make against the depredation claim of the citizen are provocation, and that the defendant tribe did not take or destroy the property, and that the Secretary was restricted in his examination to these matters and the value of the property taken or destroyed only. This argument assumes that the accounting officer had the authority to examine where claimant himself had never complied with the procedure prescribed by law; that the engagements between the United States and the treaty-making tribe were not reciprocal engagements, to be observed by one of the contracting parties as well as the other; that the one might commit wrongs and the other might not, and finally, that the Secretary had authority to ignore the plain and positive requirement of the general law then in force, that a depredation claim could only arise in a state of peace, and was applicable to trespasses committed during that condition of affairs and not to depredations and violence committed in time of actual hostility.

The rule is well established in international law that the obligations of treaties are dissolved by hostilities. Treaties containing provisions relating to matters perma-

nent in their nature, such as previous public debts, boundaries, and the tenure of property, are only suspended by war, and revive as soon as hostilities cease; but no exceptions can be found where there is but a general obligation in the treaty to refrain from acts of violence and attacks upon the persons and property of the subjects of the other contracting party. An exception of a different character is that stated by Chancellor Kent (Com., vol 1, p. 176) where he says:

> If a treaty contain any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place. All these duties of which the exercise is not necessarily suspended by the war subsist in their full force.

It is therefore as much a paradox to say that the obligations of a treaty which govern the parties thereto in time of peace continue to be the rule in time of war as it is to say that the condition of amity exists because it is provided for in a treaty when the parties to the treaty have broken it by taking up arms. The rule is that the obligations of the parties are considered as dissolved by the hostilities, and the duty of amity imposed by the past agreement is necessarily suspended.

The general rule certainly is that whatever subsists by treaty is lost by war. (2 Marten's Law of Nations, chap. 1, sec. 8; 3 Vattel, chap. 10, sec. 175; 1 Kent's Com., Lacy's ed., p. 176.) Peace merely restores the two nations to their natural state. (Vattel, lib. 4, ch. 1, sec. 8.)

And this doctrine is conceded by the Supreme Court of the United States in *Society, etc.*, v. *New Haven* (8 Wheat., 491), where the court said that while the doctrine contended for is not universally true, nevertheless there may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a *permanent* arrangement of territorial and other national rights, or which in their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war; and the court said "such a construction was never asserted," and consequently held that the title to lands already vested under a treaty could not be divested upon the termination of the treaty by war.

It is unnecessary to elaborate this proposition. It is sufficiently presented in the test case kindred to that at bar (*Marks* v. *United States et al.*) with the proposition that the legislative policy of the Government has uniformly been adverse to the payment of war claims and the assumption of liability of the demands of our own citizens arising in a state of war at any time.

AMITY JURISDICTIONAL TO THE COURT IN ALL KINDS AND CLASSES OF CLAIMS, AND ESSENTIAL TO A DEPARTMENT ALLOWANCE, EVEN IF NOT IN TERMS A JURISDICTIONAL CONDITION IN THE COURT OF CLAIMS.

Was it intended by the act we are considering, and did the law provide, that the second and third classes of claims should form the subject of jurisdiction separate

and apart from the first class of claims named in the act? And did the limitation to tribes in amity apply to all three classes or not? The claimant contends that there are different gateways to the jurisdiction of the court, and that his claim having been examined and allowed must be adjudicated on its merits, without reference to matters affecting the jurisdiction of the court. The defendants contend that all classes of claims were intended by Congress to be adjudicated upon principles precisely alike, and that the act is most susceptible to that construction which shall apply the condition of amity to Leighton's claim, even though allowed by the Secretary of the Interior. We further contend that amity was necessary to be established in the Department before there could be a lawful allowance, and even if we are mistaken as to the terms upon which the court acquired the jurisdiction, nevertheless amity was a jurisdictional condition in the Department and vital in the consideration of the claim by the court.

An examination of the different provisions of section 1 of the act in question leads to the conclusion that this section has reference to jurisdiction only; it is the authority for the action of the court in any of the cases on account of depredations of Indians. By this section jurisdiction is given and authority conferred to inquire into and finally adjudicate in the manner provided in the act all claims of the following classes, viz:

> *First.* All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the

United States, without just cause or provocation on the part of the owner or agent in charge and not returned or paid for.

Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and under subsequent acts, subject, however, to the limitations hereinafter provided.

Third. All just offsets and counterclaims to any claim of either of the preceding classes which may be before such court for determination.

The material or jurisdictional elements of the claims of each of those classes which must be shown in order to give the court jurisdiction are plainly set forth in section 1, but the material facts which are necessary to be averred in the pleadings and proven upon the trial in addition to the jurisdictional elements referred to do not appear, and can be obtained only from the previous acts of Congress relating to the claims. The act does not allow any claim or create any liability. It merely provides a method of adjudicating claims which existed under statutes prior to March 3, 1891. The first paragraph of the first section defines the class of cases and confers the jurisdiction generally, while the second paragraph includes the cases which have been examined and allowed by the Secretary of the Interior and cases author-

ized to be examined and allowed by him. Jurisdiction is given to the court to adjudicate "all claims for property" taken or destroyed by Indians without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for, with the proviso that the Indians taking or destroying the property were "in amity with the United States." The claims named in the next paragraph of section 1 are those claims which the Secretary, under the act of March 3, 1885, was required to list and examine and report to Congress; so that the clause referring to claims which the Interior Department had examined, or was authorized to examine, was carefully limited.

If it should be held that the first class of claims referred to in section 1 does not include the second and third classes, then the first class would be limited to such cases as had not been examined and allowed by the Secretary and such as were not authorized to be examined and allowed under the act of March 3, 1885, and subsequent acts. This would leave to be adjudicated under the first class only those cases having the required jurisdictional characteristics and which were not pending at the time of the passage of the act of March 3, 1885, and those cases which the Secretary had examined and *disallowed* prior to that time.

If there was no liability on the part of the tribes for the wrongful acts of Indians at the time of the passage of the act of 1891, then it is clear that no liability was assumed by that act.

The act having enumerated "classes" of claims, it is contended that it is sufficient to the jurisdiction of the

court to find that a claim falls within one of these classes; that the first class would be amity claims; the second, allowed claims, and the third, treaty claims; that if a depredation was committed by a tribe in amity, the court must take jurisdiction of it, although it was never allowed by the Interior Department, and although there were no treaty relations with the tribe charged; that if the claim has been allowed by the Interior Department, the court need not examine the question either of amity or treaty obligation; that if a treaty obligation be found, the court must take jurisdiction, even if amity is not established and the claim has not been allowed by the Department. Under this reasoning it would appear that a case might belong to two or three of these classes, and thereby possess more than one of the requisite conditions to jurisdiction; but such case would be within the jurisdiction of the court if it belonged to either one of the classes. In short, the contention is that amity is not the sole test; and that likewise neither allowance nor treaty obligation can be the sole test of the jurisdiction of the court.

That the jurisdiction of the court is entirely dependent upon the amity of the Indians committing the depredations in all classes of claims alike is clear for numerous reasons. The acts of Congress never provided for indemnification for depredations of Indians except when the tribe, by the members of which the depredations were committed, was in amity with the United States at the time of the injury. No claim could have been legally examined and allowed by the Interior Department unless

amity existed, and no claim was authorized to be examined under the act of March 3, 1885, or subsequent acts, unless this condition was shown to exist. The act of 1891 was framed with this knowledge, and it must not be presumed that this act varied the existing law. Nor does the language of the act justify a construction so incoherent, illogical, and unjust.

If the jurisdiction be separate and independent for the different classes of claims resulting in the determination of allowed claims and treaty claims in one way unaffected by the conditions of amity which obtain in cases of the first class, then we have a construction not warranted by the natural import of the words and the just interpretation of the law, and a construction not sustained by the legislative history of the act during the time it was the subject of contention on the floor of Congress.

In the first place we have a general statute conferring jurisdiction for *all claims* for property of *citizens* of the United States taken or destroyed by Indians in amity without just cause or provocation, which necessarily includes claims having the advantage of the examination or the right to an examination in the Interior Department at the time the jurisdiction was conferred on the court. Every claim of which the court was authorized to take jurisdiction was for the depredations of Indians, and, therefore, of the same common origin.

Nowhere does it appear that at any time during the progress of the later investigation of depredation claims by the Secretary of the Interior that official had entered

into the question of the amity or the hostile condition of the tribe charged. Congress legislated with full knowledge of the fact that the claims were examined and allowed in the Department upon principles that would not obtain in any court of law. It is contended, however, that claims of the second and third class constitute an independent source of jurisdiction, because, taken literally, the second and third classes of claims appear in an independent sentence of the act conferring jurisdiction. The language of the second jurisdictional clause, however, is that *such* jurisdiction—meaning the jurisdiction applicable to the first class—shall also extend to all cases examined and allowed by the Interior Department, and to such cases as were authorized to be examined and allowed. What is meant by the words "*such* jurisdiction shall also extend" to these cases, unless it was that such jurisdiction relating to claims of citizens of the United States for property taken or destroyed by Indians at peace therewith should cover and include all classes of cases? The "extension" of the jurisdiction was merely the amplification and development of the power of the court to hear and determine all cases which, up to that time, were before Congress relating to the claims.

Addition is the artificial mode of making two things into one; the increase is the result. Addition is, therefore, to increase as a means to the end. When we speak of *extending* the meaning or application of a word the extension reasonably *includes* the new matter mentioned, and the meaning of that which follows is the same as that of the original unqualified paragraph. Such construction

of the act of 1891 is fairly sustained by the terms employed to define the jurisdiction of the court, and is more than sustained by the conditions and circumstances surrounding the men who framed the new law when in the light of these circumstances and conditions we come to consider the intention of the lawmakers.

A report of a committee accompanying a bill in Congress may be referred to by the court not as furnishing a rule of interpretation, but as showing the intent of the lawmakers. (*Smith* v. *United States*, 19 C. Cls. R., 693.)

So the amendments offered to a bill reported by a committee, and the votes taken in a legislative body on these amendments, and the debates on the bill in all its stages may serve to illustrate the intention of the framers of a statute, and while not an absolute guide to the intent may reasonably be considered in cases of doubt. While statements and opinions advanced in debate are inadmissible for construction, the proceedings in a legislative body may properly be offered to inform the court of exigent circumstances and history.

Claims for the depredations of Indians have always been the objects of suspicion. It is not necessary now and here to inquire why they have been so long and generally discredited and the good faith of so many of them impeached, but the fact remains that no class of claims against the Government and those whose annuities were held by the Government have ever been so generally regarded as exaggerated and false as Indian depredation claims. In reference to them Mr. Plumb (of Kansas) stated in the Senate that he wanted an auditing so as to

relieve the claims of the suspicion that surrounded them. (Cong. Rec., Forty-eighth Congress, second session, vol. 16, pt. 2, p. 1717.)

Mr. Cockrell (of Missouri) said:

> It is a matter of absolute necessity that we shall sift these claims * * *; the Secretary can have a thorough investigation made; he can report to us all the facts; *he can show us the evidence* upon which these claims are allowed and the treaties and the funds. Then we can settle honestly and fairly, but can not do it until we have that information. (Cong. Rec., vol. 16, pt. 2, p. 1717 *et seq.*, Forty-eighth Congress, second session.)

Mr. Dawes (of Massachusetts) said:

> Therefore whenever a man sent his claim up here or referred it to the agent of the tribe, when the agent of the tribe got the affidavits furnished by the claimant and sent them up here without any hearing or cross-examination whatever, the Secretary of the Interior has written "Approved;" and the claims come to Congress, 3,100 of them in a single letter, amounting to more than a million and a half dollars, and a dozen of them were put upon a single page in this bill by the other branch with the stipulation that only 15 per cent should be paid. (*Ibid.*, p. 1718.)

Mr. Coke (of Texas) said:

> As the Senate Committee on Appropriations determined that they would not appropriate the money now to pay these claims, that they would not put these claims thus approved and reported upon this bill, then I believe the next best thing for them to do was, as the committee has done, require a full report of all these claims to be made to Congress at the next session, and when this report comes in and

> we see what they all amount to I shall favor, and I believe that the honor of the Government will require, that Congress shall take steps to liquidate them at once. (*Ibid.*, p. 1719.)

Mr. Manderson (of Nebraska) said:

> No good reason can be given for paying the claims under consideration without paying them all. This committee can not recommend the passage of such claims *until Congress adopts some general policy of dealing with all these claims.* (*Ibid.*, 1717.)

The foregoing statements were made in the Senate of the United States by members for the most part friendly to the payment of the claims, and while uttered pending the appropriation of the money to enable the Interior Department to make the investigations under the acts preceding the acts sending the claims to the courts for adjudication, the statements prove that Congress did not intend to create any new or further liability in appropriating money to have the claims examined, and that nothing was to be done and no action of any kind was to be taken until the Secretary of the Interior put before Congress the nature and character of any allowances he might make under the law.

I might make other references from the course of dealing with the claims by the Congress to further prove that Congress intended to keep to the legislative department alone the power to do with the claims as that body saw fit, after all the reports had come in, but in what I have quoted and in the refusal of Congress to pay even a small percentage of the allowances of the Secretary of the Interior, the court will find ample authority to sus-

tain me in saying that the claims continued to be objects of suspicion, and the Department investigations remained up to the last moment unacceptable and unsatisfactory to Congress, in that these investigations were to undergo the scrutiny of the Department of Justice and the Court of Claims before a claim of any kind should be paid, even though allowed under the act of 1885.

When the bill resulting in the law of 1891 was before Congress, Mr. Chandler (of New Hampshire) stated: "It is the belief, I think, of the members of the Senate committee that there are no claims likely to come before this tribunal *which have not hitherto been presented to the Secretary of the Interior.*" The Senator was referring to the Committee on Indian Depredations and to the Court of Claims, the tribunal which was to adjudicate all the claims. (Cong. Rec., Fifty-first Congress, second session, pt. 3, vol. 22, p. 2852.)

Mr. Paddock (of Nebraska) stated that—

> The purpose of this committee was to make this bill, should it become a law, consonant in all its features and provisions, *with the general system of laws which has existed from the beginning.* (*Ib.*, p. 2902.)

Mr. Mitchell (of Oregon) moved to strike out the words "in amity with the United States," but the amendment was lost.

Again, Mr. Dolph (of Oregon) stated:

> While we have no law for the payment of the claims of citizens of the United States for property destroyed by Indians, and the law has simply required them to be presented to the Interior Department and examined and reported to Congress for the last

> thirty years, there has been all the time a statute in force providing for the payment to Indians of all claims for depredations committed by citizens. (*Ibid.*, pp. 2853–2855.)

In the contention that there was a reciprocal obligation for payment of Indians for destruction of their property by white men, as well as payment for property of white men destroyed by Indians, Senator Dolph was referring to a statute under which payment could only be made for *trespasses*, and not for the taking and destruction of property in Indian wars. (*Ib.*, p. 2853.)

Again, Mr. Chandler stated: "The committee did not feel in this act like *creating any new claim*." (*Ib.*, p. 2852.)

And again, Mr. Edmunds (of Vermont), in calling the attention of the Senate to the extraordinary and irreconcilable differences and distinctions made by the act between the proof of the claims of white men and the claims of Indians, said:

> The first subdivision of the first section provides that "all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States." That is the white man's clause. (*Ib.*, p. 2905.)

Mr. Turpie (of Indiana), in discussing the act, said:

> These Indian depredations for the most part—always it seems, as the bill only provides for those in a state of amity—would in a civilized country be called malicious trespasses to property, theft, and perhaps sometimes robbery. (*Ib.*, p. 2908.)

Mr. Turpie also stated, in discussing the statute of limitations:

> To go back further than 1865 would pass us into the region of great doubt where the courts would have much more difficulty in determining whether a state of amity existed. (*Ib.*, p. 2908.)

These statements in the Senate throw light upon what that body thought they were doing in dealing with the act creating a tribunal for the hearing of the claims upon some common basis. As passed by the House the bill (H. R. 8150, Fifty-first Congress) gave jurisdiction to the proposed Indian depredation court in three classes of cases.

> First. All claims for property of citizens of the United States taken or destroyed by Indians without just cause or provocation on the part of the owner or agent in charge and not returned or paid for.

The second class was certain claims of Indians for depredations by whites, and the third, offsets and counterclaims. The words "in amity" did not occur in this bill. (See Cong. Rec., Fifty-first Congress, first session, vol. 21, pt. 10, pp. 9507–9509, and vol. 22, Fifty-first Congress, second session, pt. 1, pp. 481–486.)

The bill reported to the Senate as a substitute for the House bill is the present law. The paragraph relating to the first class was in the exact language of the first paragraph of the first section of the present law, introducing the words "in amity." The second class, stricken out in the Senate during the debate, was certain claims of Indians for depredations by whites, and the third offsets

and counterclaims. The third was in the exact words of the third paragraph of the present law.

The Senate, while amending the bill in other particulars, did not change the language reported by the committee as paragraphs "First" and "Third" which now form paragraphs "First" and "Third" of the law. (See Cong. Rec., vol. 22, pt. 2, pp. 1395–1397; pt. 3, pp. 2901–2924, Fifty-first Congress, second session.)

If it be true, as contended by claimant's counsel, that the present form of the statute is the result of a compromise between the House bill, to pay all Indian depredation claims regardless of the condition of amity, and the Senate bill, to pay only those claims which had been cognizable under the early statutes for losses by tribes "in amity," then the compromise effectuated the restrictions of the Senate bill to one body of claimants and took these restrictions away from another body of claimants without the assignment of one single reason in favor of the discrimination and with no explanation from any source for the compromise which led to such different results. But it is not reasonable to say that Congress would, in passing a mere jurisdictional statute for the adjudication of a lot of claims by one of the courts of the United States, fasten a liability on any of the affected tribes merely because some few of the claims had been allowed by the Secretary of the Interior under treaty promising payment when it was well known such treaty had been superseded by another and later treaty which did not promise payment, but which had been ignored in making the allowances. Nor is it reasonable to say

Congress meant to tie the hands of the court, change the law running through a century of time on the subject of amity of the tribe for the claims that had gone through the Department on a mistaken view of the powers of its chief executive officer, or cause the court to adjudicate according to the will of a Department officer.

The more rational view is that when the conference committee got together there was a ready agreement to report to each House of Congress the Senate bill preserving the feature relating to the amity of the tribe as an essential condition for recovery in *all* claims, and to adopt the Senate view of the matter expressed by the action of that body in striking out the second paragraph of the House bill relating to the depredation of white men on the property of Indians.

It is urged that the construction of the statute which shall prevent the court from inquiring into the condition of amity for claims on file in the Interior Department is supported by the use of the word "classes" in the act. That this does not follow is clear on two grounds: First, the word "classes" is a survival from the committee stage of the measure when it included under the second heading all claims by Indians against white men; secondly, even without this clause, which was stricken out by the Senate, the act provides for two classes of claims, if we assume that those named in the second clause are really included in the first and are only specified through an abundance of caution, the other "class" being number three, "all just offsets and counterclaims." The truth is, the conference committee undertook to guard against the possible exclu-

sion by implication of all claims which had already been considered; and no doubt, in the busy scenes of the closing hours of the Fifty-first Congress, claims for Indians were stricken out on the general Senate objection and claims which had been filed with the Interior Department inserted as a substitute.

Two of the judges in the court below thought that independent jurisdictions were intended by the act upon the ground, *inter alia*, that when the bill went to the conference committee with the thirteenth section as framed originally in the House bill, it followed that the new policy separating and extending the jurisdiction for the different classes of claims was made complete by the addition of section 13 to the present law. This argument, however, will not hold good, because, when the House bill went to the Senate and all after the enacting clause of the bill was stricken out, the new matter supplied by the Senate contained a direction in section 16 of the Senate bill for the examinations in the Interior Department to cease, which is substantially the direction of section 13 of the present law. Hence, the addition of section 13 in the act as it now stands did not have its origin in the conference committee at all, but was carried there from the Senate after that body got through its work of amending the House bill.

In one of the cases of the claimant Leighton, recently tried in the court below for a depredation in which the Cheyennes were involved with the Sioux, and where the court thought amity was clearly proven, it was considered by the court an unanswerable objection to the claimant's

contention that "allowed claims" constituted a separate and distinct jurisdiction from those embraced in the first subdivision of the law, because the amity of the tribe (if claimant's proposition were true), which was jurisdictional before the Interior Department, would cease to be jurisdictional in the court; and, in that event, a claimant might recover, though his claim arose from open and flagrant war, unless the amity of the tribe was made a test of liability instead of jurisdiction. Besides, as to claims which were allowed in favor of citizens or inhabitants under the act of 1834, where no treaty relations existed, there could be no controversy, but that the amity of the tribe was jurisdictional before the Interior Department. (*Leighton* v. *United States et al.*, 29 C. Cls. R., p. 288.)

Under the law, as the Court of Claims have construed it, the United States become jointly liable with the Indian tribes for the taking or destruction of property where such tribes can be identified. If they can not be identified as provided in section 5 of the act, there is no liability, nor can judgment be rendered against any particular tribe, the proof showing that the depredators were unknown Indians, but in such case the judgment must be against the United States alone. (It is proper that I should say here that an appeal is now pending in this court taken by the United States in a case involving this question.) Congress never intended to confer jurisdiction on the court merely because there was a treaty with some tribe.

The act of March 3, 1863, expressly prohibits the Court of Claims from taking jurisdiction in cases grow-

ing out of or dependent on treaty stipulation. This statute is applicable to treaties with the Indians as well as treaties with foreign nations. It has never been repealed. As repeals by implication are not favored, it can not justly be said, taking all the laws and treaties and agreements relating to the depredations of Indians, that the act of 1891 repealed the statute mentioned. The statute is as follows:

> The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December 1, 1862, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes. (Sec. 1066, Rev. Stat.)

Even if it should be held that the Court of Claims had jurisdiction of the case at bar under the second clause of the first section of the act of March 3, 1891, this fact would not alter the ultimate judgment of the court. The amity of the Ogallala Sioux at the time of the depredation is still an essential fact to be proved.

Did Congress by the statute of 1891 create a liability on the part of the United States which did not exist before? The claimants insist that the act conferred upon the court all the discretion necessary to give relief that existed in Congress itself. This is a most extraordinary proposition; but it has been urged with such force and vehemence as to merit attention.

The Court of Claims can not imply a liability from a statute merely jurisdictional when none is expressed or where the implication is not certain. Cases that go to the Court of Claims from Congress go there to be tried

according to the law, without being shorn of defenses which legally exist. The Court of Claims is not merely a committee advisory to Congress, with the right to pass on the facts only without applying thereto whatever conclusions of law may in the judgment of the court be applicable. If this proposition were not correct, then there would be no appeal to the Supreme Court. But there is a right of appeal in all cases under the general jurisdiction of the court, and that right is expressly given by the terms of the act of March 3, 1891.

> It must now be regarded as a fixed principle in this court that a simple reference of a case by Congress to this court of itself waives no legal defense which the Government as defendant may have, excepting only the statute of limitations. When Congress specially sends a case to be heard and determined here, that enactment probably overrides the existing general enactment that such a case is barred from being brought by lapse of time. There are, indeed, cases where the reference of a claim by Congress to this court may operate as a ratification of a transaction which was in terms made subject to the approval of Congress; but apart from these two exceptions it is difficult to conceive of any case where the mere act of referring by enactment will change by implication the law otherwise applicable to the facts of the case. (*Cruger's Case*, 11 C. Cls. R., 766, 770.)

Sometimes cases have been referred where the assumption of a contingent liability, or the ratification of a prior transaction, or the waiver of the statute of limitations is the *necessary implication*, though not expressly stated in

the words of the statute, as in the case of *Roberts et al., trustees*, v. *United States* (92 U. S., 41), although in that case there were dissenting opinions by three members of the court; and the opinion of the majority was in reversal of the unanimous opinion of the Court of Claims on the question of what Congress principally intended to refer for adjudication. (6 C. Cls. R., 84.) The opinion in the Roberts Case in the Supreme Court was put upon the ground that it was plain that Congress principally intended to refer to the adjudication of the lower court the amount of compensation to which the claimants were entitled, and for that purpose prescribed the principle by which it should be estimated; but even if it was intended to refer the whole subject, the right to compensation as well as the amount, the claimants under the circumstances of the case were, in the judgment of this court, entitled to compensation. (92 U. S., 49.)

The cases where Congress have made a positive acknowledgment of liability, or where it was intended by the reference to waive legal defenses, are extremely rare. It is therefore reasonable to say that whenever the question of implied liability is presented the language of the reference ought to admit of no controversy, or certainly be so clear that nothing else would reasonably be left for the court to do but find the facts. In the last case which presented the question of an implied liability the Court of Claims, as well as this court, held against the right of the claimant to recover where claimant brought suit under an act which stated:

> That the claimants be permitted to sue in the Court of Claims, which court shall pass upon the

> law and facts as to the liability of the United States for the acts of its officer, Joshua F. Bailey, by reason of the seizure, detention, and closing up of the commission houses and bonded warehouses of said copartners, for the breaking up and interruption of their said business, and for the seizure and detention of the property, books, and papers in and connected with said business by Joshua F. Bailey, collector of internal revenue for the fourth internal-revenue district of said State, or by said Bailey and other internal-revenue officers. The United States shall appear to defend against said suit, and either party may appeal to the Supreme Court as in ordinary cases against the United States in said court; and said suit may be maintained, any statute of limitations to the contrary notwithstanding.

The decision of the court below was affirmed by this court, where Mr. Justice Harlan, speaking for the court, said:

> The only right waived by the Government was a defense based upon the statute of limitations. There would seem to be no escape from the conclusion that Congress intended that the liability of the Government should be determined by the settled principles of law. (*Cumming* v. *United States*, 130 U. S., 452.)
>
> These decisions of the Supreme Court more than sustain all that was said in *Cruger* (*supra*), and preclude the judiciary from implying a liability from a jurisdictional statute when none is expressed or where the implication is not inevitable. (*Love, administrator*, v. *United States et al.*, 29 C. Cls. R., p. 332.)

If Congress intended by the jurisdictional act of 1891 to waive any of the legal defenses which might exist to an Indian depredation claim, no matter what its origin,

it would have said so in unmistakable terms, and at least it would not have done so inferentially. There is nowhere any intimation that the investigation of the Court of Claims was to be conducted otherwise than judicially upon the law as well as the facts. The reference was made to the court as a court, and not to the judges as arbitrators. The determination was to be made according to those fixed rules which govern that court in the adjudication of cases, and not at the discretion of the judges, and still less at the discretion of a Department official. The same principles of jurisprudence and the same statutory regulations as to practice were to be applied by the court that would be if the case had come into the court under its general jurisdiction, except as to those cases which had gone to an award in the Interior Department; and even as to those, upon election of either side to have a trial, the court was required to give the parties a trial. There was no discretion about it.

Under an act where the Court of Claims was authorized and directed to ascertain and adjudge the amount equitably due a firm, if any, for loss or damage, the Supreme Court held that the word "equitably" meant no more than that the rules of law applicable to the case should be construed liberally in favor of the claimants. (*Tillson* v. *United States*, 100 U. S., 43.)

Whatever may be said with reference to the jurisdiction of the court upon the different classes of claims, tribal liability must rest upon the principles and obligations of international law and the statutes of the United States and those treaties only with the Indians to which the statutes specifically refer. Government liability must

likewise rest upon the previous statutes or treaties where Indian liability has been clearly defined.

Through all the statutes we find that depredations of Indians have not been the subject of consideration unless the tribes were in amity with the United States, whether in treaty relations or not in treaty relations. The act of 1885, under which the Secretary of the Interior began the investigation of claims under treaties, was merely an appropriation act containing a direction to expend the specific sum appropriated in the investigation of the pending claims of citizens chargeable by virtue of treaty. There was no authority for the Secretary to allow claims merely because the Indians were in treaty relations. There must have been a specific promise on their part to pay such claims. The act of 1891 is substantially the act of 1834, limiting claims, however, to citizens, as did the act of 1885, and substituting the words "without just cause or provocation" for the words "that if such injured party, his representative, attorney, or agent, shall in any way violate any of the provisions of this act by seeking, or attempting to obtain, private satisfaction or revenge, he shall forfeit all claims * * * for indemnification." That the Secretary of the Interior was merely substituted by the act of 1885 and subsequent acts to take the place of the committees of Congress and make up his reports upon investigations by agents of his own selection in cases where treaties made specific promises, was in pursuance of that line of policy adopted by Congress that the Indians were not to be bound to pay for depredations until Congress should specially appropriate for them. (Sec. 2098, Rev. Stat.)

Intention is to be ascertained by considering the entire statute (Sutherland on Interpretation and Construction, sec. 239, p. 317), and intention of the whole act will control interpretation of parts. (*Ib.*, sec. 241, p. 319.)

Where a statute is incorporated in another the effect is the same as if the provisions of the former were reenacted in the latter for *all the purposes of the latter statute*, and the repeal of the former statute does not repeal its provisions, so far as they have been incorporated in the act which is not repealed, where the adoption was for the purpose of providing for a subject-matter not within the original statute. (*Ib.*, p. 337, sec. 257.)

By the act of 1885 Congress intended that the claims of citizens pending in the Interior Department for depredations should be investigated in treaty cases in accordance with the provisions of section 17 of the act of 1834. The Secretary interpreted the act that way as to claims not filed within three years, because as to these claims he held them to be barred, as he did under the act of 1872. The record in Leighton's Case shows that when the Secretary first got to it he rejected the claim because of the statute of limitations of three years. The interpretation of the Secretary was recognized by Congress by the act of May 15, 1886 (24 Stat. L., 44), in the requirement that the Secretary should examine and report claims barred by the statute. But the interpretation by the Secretary that a treaty broken by hostilities created the obligation of payment was never recognized by Congress and can not be by the court. This question was not considered by Congress at all.

EFFECT OF REOPENING.

Under the fourth section of the act conferring jurisdiction on the court below, however, Leighton filed an election to reopen the Department allowance of his claim and to try the same before the court. Accompanying this election to reopen was an averment that the allowance of the claim was erroneous in that the Commissioner of Indian Affairs and the Secretary of the Interior undervalued some of the property alleged to have been lost by him. The claimant then referred to the evidence taken under the rules of the court, as well as that presented to the Interior Department, in support of this allegation of error, and stated that he did not seek to disturb the findings or award of the Commissioner of Indian Affairs and the Secretary of the Interior in any other respect, except as to the values placed upon some of the lost property.

The attempt to qualify the election to reopen can not be sustained.

Section 4 of the act of March 3, 1891, provides:

> That all unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and subsequent Indian appropriation acts, shall have priority of consideration by such court. And judgments for the amounts

> therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses, and the documentary evidence, including reports of Department agents therein, may be read as depositions and proofs: *Provided*, That the party electing to reopen the case shall assume the burden of proof.

The statute makes it clear that if either party attempts to exercise the right conferred by law to reopen and try the case it must be done without qualifying the conditions imposed. The burden of proof is shifted by the mere act of the party filing the election to reopen. A trial before the court is provided for by the filing of any paper which shall show that the case is reopened for any purpose. The reopening can not be restricted in any sense. Nor ought it to be, if the ends of justice are to be subserved. No act of the party can carry conditions which the court can observe wherever the election to reopen is presented for judicial action of any kind. If the case is reopened for one purpose it is reopened for all purposes. The direction is explicit that the judgment of the court on the award of the Secretary of the Interior shall be rendered, unless either the claimant or the United States shall elect to reopen and try, in which event the court shall give to the parties the same kind of a trial that would be given to them if the case had not come to the court as one allowed by one of the Departments of the Government.

The mere direction to the court to try the case necessarily includes the command to give to the parties the same kind of a trial that would be given to them if the

case was to be tried in the first instance. The contention made by claimant that it must not be imputed to Congress a purpose to cut this work into two entirely different parts is a sufficient answer to the argument. Certainly the intention can not be imputed to Congress to so divide a case that the court shall be compelled to follow the findings of the Secretary of the Interior in one respect and reject his findings in another respect when an election to reopen is filed by either party. It would not be a "trial," if, as contended by claimant's counsel, "the court can not refuse to render judgment because its view of the law differs from that of the Department." The proviso throwing the burden of proof upon the party electing to reopen is in line with the other sections of the law rewarding diligence in the claimant and in accordance with the general maxim that there should be an end of litigation. But Congress also provided for the correction of the mistakes of the Secretary of the Interior as well as errors in making allowances upon questions quite independent of the facts of the case. The contention of the claimant that the case at bar can only be reopened for the purpose of correcting an erroneous estimate of the value of the property would afford a precedent in other cases that no court having jurisdiction could afford to follow. Suppose we, for instance, prove the fact under an allowance made by the Secretary of the Interior, in favor of two or more claimants, that they were merely joint owners of the property and not partners, or that there was provocation, or that one or more of the parties had assigned their interest, can it be said that the error

must be ratified by a court taking the jurisdiction because the Secretary had made an award of this kind or had not reached correct conclusions upon the facts?

Again, can it be contended with any degree of reason that when the defendant reopened an award for the purpose of presenting a particular defense to its correctness or legality the claimant shall not have the privilege, while asserting the rightfulness of the award, to also say that other depredations were committed at the same time and place on other property of the claimant and by the same band of Indians, and on such showing pray judgment of the court for the other losses thus ignored by the Secretary and be entitled to judgment on the proper proof? The defendant, in such case, could no more confine the trial to the particular defense which they might desire to raise than could the claimant say that the trial must be confined to the mere question of values on what was already allowed. Suppose, again, that the finding of the Secretary of the Interior was that the claimant was a citizen of the United States and that the value of the property lost by him was $15,000. There is no proof upon the subject of citizenship. The claimant seeks to reopen upon the ground that the allowance was not in a sum sufficient to compensate him for the property lost. It would result from claimant's argument that he might reopen upon the question of amount alone, while it would devolve upon the defendants also to reopen upon the question of citizenship alone, thus placing upon the claimant the burden of showing the error of the Secretary's allowance as to amount, while upon the defendant

would be thrown the burden of showing affirmatively the fact that the claimant was not a citizen.

It is urged, however, that the reopening can not be had because, on the facts of the case, the Department made an error of law. The answer is manifest if the statute is well considered. The reopening can be had without reference to reasons. Neither of the parties is put to the necessity of stating the causes for his action in reopening at all. The right is absolute, with the risk of a disadvantageous result, whenever either side elects to reopen. This election is altogether optional and when exercised can not mean a partial trial or an investigation of any particular question. Whenever a case is reopened the Government has the right to demur, to claim that there was no authority for the allowance, or that there was provocation for the depredation, and, in short, to present any matter jurisdictional or defensive. The word "try," as used in the act, or the word "proof," may, in their general use, have reference to facts, because the facts are usually tried and cases proved before juries, who are the judges of the facts of the case, but the words used in the act under consideration have reference to cases to be tried and cases to be proved before the court, which must render judgment upon the *facts* and the law.

If the legislative body had intended to limit the inquiry of the court in this class of cases to questions of fact and to the merits the act would certainly have indicated this intention more explicitly and left no room for doubt in the premises.

Cases are now pending in the court where the Interior Department allowed claims to aliens when authorized to examine and allow only for citizens. If claimant's contention be true that this court can inquire only into the *merits* of cases allowed under the act of March 3, 1885, and that the finding of the Secretary of the Interior is conclusive as to all other matters—citizenship, treaty, etc.—then the claim of the alien must ripen into judgment by reason of the allowance, while the claim of the citizen which has not been allowed, being subject to the defense of the want of amity, if war is proven, could not have that privilege. Possibly the two depredations were committed at the same time by the same Indians, yet this would be the inevitable result should claimant's contention be sustained.

It is not reasonable to suppose that Congress held the ability of the Interior Department to determine questions of *law* in higher esteem than that of the judiciary. It is equally unreasonable to suppose that in transferring these claims from an executive to a judicial branch of the Government the inquiry would be limited to questions of fact. It would have more likely been the policy of Congress, if any limitation was to be placed upon the court, to have held it to the finding of fact made by the Interior Department, leaving questions of law open for judicial determination.

When the case was first open it was open upon all the questions therein involved. Not only the question of value, but all matters of defense were eligible to consideration. Now that the case is reopened it is again in its

former condition; the question of value may again be considered, and likewise all matters of defense. This view of the statute is reasonable, and it seems that, without doing violence to its language or thoroughly disregarding its meaning and intention, no other view of the question can be taken. The uniform line of decisions on new trials in courts of general jurisdiction in this country and Great Britain is in accord with this view. A new trial is a hearing upon all material elements of the case. When the judgment is set aside the whole case is to be tried *de novo*, and not upon any certain part that may be elected by one side or the other. This is the general rule in all civil and criminal cases.

The case being reopened, we find that it must be tried "in the manner provided in this act." This *manner* is set forth in section 4. The first part of this section enumerates the proper defenses to be made by the Attorney-General:

> It shall be the duty of the Attorney-General of the United States to appear and defend the interests of the Government and of the Indians in the suit, and * * * to file a plea, answer, or demurrer on the part of the Government or the Indians, and to file a notice of any counterclaim, set-off, claim of damages, demand, or *defense whatsoever* of the Government or of the Indians in the premises.

Any "*defense whatsoever*," then, within the realm of common or statutory law is, under the express provisions of the statute, a proper one to be made.

There can be no doubt that this "manner" of investigation applies equally to all claims. The language of

the jurisdictional section sustains this. (*Vide*, sec. 1.) Again, section 3 provides "that *all claims* shall be presented to the court by petition," and section 4 directs that "the service of the petition shall be made upon the Attorney-General," etc., and then proceeds to outline his duties and the methods of defense he may employ, as above quoted. Nowhere in the statute is there any distinction as to the manner of trial made between the three classes of claims over which the court has jurisdiction, except that claims allowed under the act of 1885 and subsequent Indian appropriation acts shall have priority of consideration, and that judgment for the amount found due shall be rendered unless one of the parties shall elect to reopen the case. But in case it is reopened no limitation is put upon the means of defense covering any matter of law or fact. For all practical purposes the reopening is not only something in the nature of an appeal from the judgment of the Secretary, involving every possible matter which the record discloses to have been before him for consideration, but this reopening admits of matters for consideration by the court which were overlooked and not considered by the Secretary. The reopened allowance is thus presented for judicial determination on any defense whatsoever which could have been made at any time anywhere. The reopening annuls the allowance not absolutely, but to this extent, that if any error, either of law or fact, apparent or *dehors* the record, can be pointed out in connection with the case the court must take the proper judicial action on it in the new trial.

But it is argued that no objection to jurisdiction can be presented after reopening which could not have been

presented before reopening; that the words "to try the same before the court" imply that the case becomes open to trial upon its merits, and certainly does not make it become open to be dismissed for want of jurisdiction which existed up to the moment of reopening.

There is in this view of the matter an excellent reason given in support of the defense that the jurisdiction of the court was never acquired by the mere allowance of claims by the Department. The claims for depredations under the jurisdictional act, whether allowed or disallowed or unacted on in the Department as well as all claims not filed before Congress or the Department, were plainly made determinable by the statute upon the same common principles, and herein may be seen the wisdom and the value of section 4 of the act which provides for the reopening of any of the Department allowances. If, however, it should be held that the allowance of the claim by the Department gave the Court of Claims jurisdiction under the act of 1891 without reference to those requirements provided for other claims in the first paragraph of section 1 of the statute, the defendants still have the right by the reopening to present and make effective all defenses which include the right to show that the Department allowance was void on grounds jurisdictional to the Department. To say that the privileges of the defense are limited to the correction of the mistakes of the Secretary in matters of fact, but that the court is bound by an allowance made outside of jurisdictional conditions imposed on the Secretary by the act of 1885, is to say that Congress provided for the cor-

rection of small errors, but bound the court to ratify the most vital defects in every allowed case.

The intention of Congress seems to have been to give the jurisdiction over the cases for the first time to a court of law; to have the previous statutes, as well as the jurisdictional one, interpreted according to the principles of law; to have remedied many inconsistencies and errors which had unavoidably crept into the work when it was done by the continually changing forces of an Executive Department or a Congressional committee, and to harmonize the policy of the Government in these cases with the principles on the subject; out of injustice and delay to derive justice; to bring order out of chaos.

This beneficent intention can not be carried out by attempting to follow all the practices which may have been established at various times by the Department.

TRIBAL AND GOVERNMENT LIABILITY UNDER THE JURISDICTIONAL STATUTE CONSIDERED.

Nearly sixty years after the general law providing for indemnification on account of tribal depredations (trade and intercourse act) Congress enacted the law under which the suit in this case was brought. Under this act the claimant is charged with some responsibilities and held to the observance of some rules of law. He must file a petition which brings his cause of action within the jurisdiction of the court. He does not accomplish this by naming the United States alone as defendant; he must sue a principal, inasmuch as the United States is not primarily but secondarily liable. (*Gorham* v. *The United*

States, 29 C. Cls. R., 97; *Graham* v. *The United States*, No. 614, MSS. Opin. C. of Cls.; *Leighton* v. *The United States*, 29 C. Cls. R., 288.) No judgment can be rendered against the United States alone except in those cases where the particular tribe of Indians committing the wrong can not be identified. In all cases it must affirmatively appear that Indians in amity with the United States were the offenders in the taking or the destruction of the property. The amount of every judgment rendered against any tribe must be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and the annuities due said tribe from the United States shall be chargeable with the amount of the judgment, where such annuities are due or available. If no such annuity fund or appropriation is due to the tribe or available for its use, then the amount of the judgment is payable from the public Treasury. In such case the amount so paid by the United States is to remain a charge against the tribe against whom the judgment is rendered, and to be deducted from any annuity fund or appropriation which may after the judgment become due from the United States to the offending tribe.

The act of 1891 did not create the liabilities of the Indian tribes, being "remedial for claims which existed prior to its passage."

The conditional liability of the United States in the case we are now considering does not rest upon any statute previous to the act of 1891, which promised Gov-

ernment liability with or without conditions. Leighton's claim originated in 1866, while the act of February 28, 1859, Sec. VIII (11 Stat. L., 401), expressly repealed so much of the trade and intercourse law as provided that the United States should make indemnification for property taken or destroyed by Indians trespassing on white men. Imposing no new or additional obligations, but being a jurisdictional statute altogether, the act of 1891 must be administered upon principles declaratory of Indian liability under previous statutes. Whatever liability, therefore, may be found to exist against the defendant Sioux must be deduced from the seventeenth section of the act of 1834 modified or supplemented since that time by such other legislation as Congress saw fit lawfully to impose.

As showing the interpretation Congress put upon the kind of depredations the Government was originally liable for under the act of 1834, attention is directed to the act repealing this Government liability, which reads as follows:

> That so much of the act entitled "An act to regulate trade and intercourse with the Indian tribes," approved June 30, 1834, as provides that the United shall make indemnification out of the Treasury for property taken or destroyed in certain cases by Indians *trespassing* on white men, as described in the said act, be, and the same is hereby, repealed.

The joint resolution of June 25, 1860 (12 Stat. L., 120), construing the repealing act of 1859, also referred to the original liability as applicable in certain cases to Indians *trespassing* on white men.

Trespasses apply to a state of peace and not to a state of war; depredations, which include the covert as well as the forcible taking or destruction of property, may occur either in time of peace or in actual hostilities. But the depredations provided for by Congress in every statute ever passed on the subject relate to depredations which occurred during our amicable relations with the tribes.

The act of 1859, repealing Government liability, contained a proviso that nothing in the repealing act should be so construed as to impair or destroy the obligation of the Indians to make indemnification out of the annuities prescribed in the act of 1834, referring to such obligations as had been undertaken or were imposed upon the tribes under the act of 1834. The act of July 15, 1870, Sec. IV (16 Stat. L., 360, sec. 2098 Rev. Stat.), excluded the payment of all claims for Indian depredations until Congress should thereafter make special appropriations for the payment of such claims. The act of 1872, Sec. VII (17 Stat. L., 190, secs. 445 and 466 Rev. Stat.), directed the Secretary of the Interior to prepare and publish rules and regulations prescribing the manner of presenting such claims under *existing laws or treaty stipulations*. The act of March 3, 1885, directed the Secretary to make a complete list of all the claims pending and unexamined at that time, and all the claims approved before that time in whole or in part but yet unpaid, chargeable against any tribe of Indians by reason of *any treaty* between the tribe and the United States. The act of 1886 provided for the continuation of the investigation and examination of claims originally authorized by

the act of 1885 directing an examination and report to include claims, if any, *barred by statute*. Under the act of 1886 Leighton's claim was allowed.

Elsewhere I have shown that the Ogallala Sioux are not liable under the treaty of 1865 for the payment of the claim in this case. If, therefore, the tribe be liable at all, such liability must be deduced from the general law of 1834 and the act of 1891 putting in force the provisions of the original statute.

The act of 1834 provided that a depredation claim must be submitted to the Indians in council that they might be heard in their defense. As far back as 1860 it was declared by the Commissioner of Indian Affairs that the presentation of the claim would have been a mere formality resulting in nothing if there were no obstacles to prevent its being done; but the law demands that it shall be done, "and as an executive officer I have no equity power to give relief against its positive requirement." (Letter of Commissioner of Indian Affairs to chairman Senate committee.)

There was a requirement also in the act of 1834 that unless a claim should be presented within three years after the commission of the injury the same should be barred. The presentation must have been made to the proper superintendent, agent, or subagent; and if the nation or tribe should neglect or refuse to make satisfaction within twelve months it then became the duty of such superintendent, agent, or subagent to make return of his doings to the Commissioner of Indian Affairs. The claim in this case was not presented to the Commissioner of Indian Affairs until March 8, 1873, more than

three years after the bar of the statute had fallen. What view shall the court take of the statute of limitations as applicable to this case in view of the act of 1886, directing the Secretary of the Interior to examine and report claims barred by statute, and the recognition of claims reported by the Secretary under the act of 1886 by the jurisdictional statute under which the suit has been brought, and also in view of the fact that the reopening of the claim took from the same whatever of rights it may have had as a preferred claim under the Secretary's allowance?

The plea of the statute of limitations is generally a personal privilege, and may be waived by a defendant or asserted at his election; but where he has parted with his interest in property his guarantors, mortgagees, or other persons standing in his place are entitled to avail themselves of all the advantages of this plea. If the United States alone were involved it is not doubted but that the privilege could be waived for and by the Government, as much so as for and by an individual acting in his own behalf. But can the United States, after the bar of the statute had fallen, and when the tribe charged had no opportunity to make defense upon complaint within the time fixed by the same law for presenting claims, waive this statute so as to charge annuities held in trust for the tribe and derived from treaty agreement to pay to the tribe according to the terms of treaties intervening since the depredation was committed?

It is elementary that before the bar of the statute of limitations has fallen the State may, as to individual rights and remedies, establish, alter, lengthen, or shorten

the period of limitation, and so defer, hasten, or do away with the defendant's expected immunity, provided a reasonable time is given the plaintiff to bring his suit before the right is barred. But after the bar of the statute is complete, does the repeal of the statute confer the right to proceed against annuities agreed to be paid under a treaty to a treaty-making power without a violation of the rights of the other party?

It is settled that in actions to recover property, real or personal, that no subsequent repeal of the statute can divest the defendant of the title he has acquired and thus deprive him of his property without due process of law after the bar of the statute is complete.

This proposition is true, whether applied to rights acquired by private contract or by treaty, and rests upon the highest authority.

Whether additional remedies can be given to restore an old one which has been lost by time is a question upon which courts have differed, and I am not unaware of the high sources which declare that the whole subject of remedies rests within legislative will and may be varied at pleasure. But the general principle is that if the time limited by statute for commencing a suit expires while the statute is in force and before the suit is brought, the right to bring the suit is barred and no subsequent statute can renew the right, and this proposition is also supported by the highest authority, and more of it than the converse statement. The following references, involving a discussion of the question, substantially holding that when the right to sue has been lost that right can not be renewed by subsequent legislative action, are

herewith submitted in support of the contention on this part of the defense:

> *Martin* v. *Martin*, 35 Ala., 560; *Clark* v. *Bank of Miss.*, 5 Eng. (Ark.), 512; *Dyer* v. *Gill*, 32 Ark., 410; *Clark* v. *Bank*, 10 Ark., 512; *Willoughby* v. *George*, 5 Colo., 80; *Bond* v. *First National Bank*, 5 Colo., 83; *Naught* v. *O'Neal*, 1 Ill., 36; *Right* v. *Martin*, 11 Ind., 124; *McKinney* v. *Springer*, 8 Blackf. (Ind.), 506; *Stipp* v. *Brown*, 2 Carter (Ind.), 647; *Thompson* v. *Read*, 41 Iowa, 48; *Forsyth* v. *Ripley*, 2 Greene (Iowa), 181; *McCracken Co.* v. *Mercantile Trust Co.* (discussion and cases), 84 Ky., 344; *Atkinson* v. *Dunlap*, 50 Me., 111; *Mayor, etc., of Hagerstown* v. *Schner*, 37 Md., 180; *Kinsman* v. *Cambridge*, 121 Mass., 558; *Ludwig* v. *Stewart*, 32 Mich., 27; *Joy* v. *Thompson*, 1 Dough. (Mich.), 363; *Davis* v. *Minor*, 1 How. (Miss.), 183; *Woodman* v. *Fuller*, 47 Miss., 682; *Power* v. *Telford*, 60 Miss., 195; *Rockport* v. *Walden*, 54 N. H., 167; *Moore* v. *State*, 43 N. J., Law, 203; *Whitehurst* v. *Dey*, 90 N. Car., 542; *Pearsall* v. *Kenan*, 79 N. Car., 472; *Baldro* v. *Tolmie*, 1 Oreg., 176; *Pitman* v. *Bump*, 5 Oreg., 17; *Bagg's Appeal*, 43 Pa. St., 512; *Com.* v. *Duffy*, 96 Pa. St., 506, 514; *Girdner* v. *Stephens*, 1 Heisk (Tenn.), 280; *Wires* v. *Farr*, 25 Vt., 41; 24 Vt., 620; *Bradford* v. *Brooks*, 2 Aiken (Vt.), 284; *Brown* v. *Parker*, 28 Wis., 21, 28; *Parish* v. *Eager*, 15 Wis., 532; *Spreeker* v. *Wakely*, 11 Wis., 432, 440; *Hill* v. *Kricke*, 11 Wis., 442.

In *Bigelow* v. *Bemis* (2 Allen, 496), which was an action on contract, the supreme judicial court of Massachusetts, speaking by Chief Justice Bigelow, says:

> It is well settled that it is competent for the legislature to change statutes prescribing a limitation to

> actions, and that the one in force at the time of suit brought is applicable to the cause of action. The only restriction on the exercise of this power is that the legislature can not remove a bar or limitation which has already become complete, and that no new limitation shall be made to affect existing claims without allowing a reasonable time for parties to bring actions before their claims are absolutely barred by a new enactment.

In *Ryder* v. *Wilson's Executors*, which was a suit on promissory notes, the supreme court of New Jersey, speaking by Chief Justice Beasley, says:

> The decisions of the courts, so far as my research has extended, are wholly in accord on this subject, and with one voice they declare that when a right of action has become barred to rely upon the statutory defense is a vested right that can not be rescinded or disturbed by subsequent legislation. (41 N. J. Law Rep., 9.)

In *Davis* v. *Minor*, which was an action on contract, Chief Justice Sharkey, in a Mississippi case, said:

> A bar created by the statute of limitations is as effectual as payment, and a defendant can not be deprived of the benefit of such payment nor of the evidence to support it, and, having provided himself with evidence sufficient and legal at the time of payment, no law can change the nature or destroy the sufficiency of the evidence. (1 How., 183, *supra*.)

Judge Cooley, discussing this subject, says:

> Regarding the circumstances under which a man may be said to have vested right to a defense against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities

> will justify. It is certain that he who has satisfied a demand can not have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the demand is gone, and to restore it would be to create a new contract for the parties, a thing quite beyond the power of the legislature. (Cooley's Const. Lim., 3d ed., 369, 429.)

Whatever view may be taken of the general principle respecting the right to revive a remedy barred by limitation, it is certain that the title to the annuities provided for in the treaty between the Sioux and the United States is in the Government as the trustees for that tribe under solemn treaty agreement for purposes which exclude charges for depredations of the tribe before that time. The three years statute, it would seem, should operate on this title, and if the United States became the trustee for funds conceded by the contract of a treaty supposed to have a consideration, no part of such annuities ought of right to be diverted by subsequent legislation for purposes outside of and independent of the provisions of the treaty subsequent to the depredations. This treaty was made and concluded in 1868, and after Leighton's loss. This contention is in line with the principle that property held adversely can not be reached by the subsequent repeal of the statute which has invested the title after the bar of the statute has become complete. The doctrine is everywhere recognized that where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by

the real owner, such a person has acquired a good title, a title superior to that of one who has neglected to avail himself of his legal rights, and which neglect has lost the real owner his title. This doctrine has been repeatedly asserted. It is the doctrine of the English courts and of the Supreme Court of the United States. The lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right and vests a perfect title in the adverse holder. (*Leffingwell* v. *Warren*, 2 Black, U. S., 599; *Croxall* v. *Shererd*, 5 Wall., U. S., 268; *Dickerson* v. *Colgrove*, 100 U. S., 578; *Bicknell* v. *Comstock*, 113 U. S., 149.)

I am not unmindful of the fact that Congress may by subsequent legislation repeal the provisions of a prior treaty, and that a treaty is regarded by the courts as of no higher degree or of no greater solemnity than an ordinary legislative enactment. (11 Wall., 616; 109 U. S., 556; 149 U. S., 698.) Nor am I unmindful of the fact that the relations between the Indian tribes and the United States are anomalous. But how and why are these relations anomalous? In that the tribes are neither tributary sovereign States nor foreign bodies politic, but dependent, uncivilized nations comprised within our boundaries. The tribes are dependent because we support them with annuities in return for lands which we have wrested from their possession; and dependent because we have made them so and it suits us to keep them in that condition. They are dependent possibly because the interests of civilization require us to keep them so. Nevertheless we have accorded to these tribes

a certain political entity and have made treaties with them in which certain promises have been entered into by the Government.

Those cases where this court has held that treaties are subject to such acts as Congress may pass for their enforcement, modification, or repeal, apply generally to cases where Congress has modified or repealed treaties in the exercise of the police power and where some necessity has seemed to justify legislation superseding previous treaty provisions. For instance, the act to regulate immigration (22 Stat. L., 214), which imposed a tax payable into the public Treasury upon each and every passenger not a citizen of the United States who shall come from a foreign port to any port within the United States, was declared to be valid, and this court said that objections relating to the expediency or justice of the measure could not be the subject of consideration by the courts. (*Head Money Cases*, 112 U. S., 599.)

In the Chinese exclusion case the court upheld the act excluding Chinese laborers from the United States as a constitutional exercise of legislative power, and declared that so far as the law conflicted with existing treaties between the United States and China it operated to that extent to abrogate the treaties. (*Chae Chan Ping* v. *The United States*, 130 U. S., 581.) So, also, in the Chinese deportation cases, which involved the right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, it was declared to be, by a divided court, the inherent and inalienable right of every sovereign and independent

nation to pass such laws even in contravention of stipulations of an earlier treaty. (*Fong Yue Ting* v. *United States*, *Wong Quan* v. *United States*, *Lee Joe* v. *United States*, 149 U. S., 698.) So much of the tenth article of the treaty of 1866 between the United States and the Cherokees as was repugnant to the act of Congress extending the internal-revenue laws over the Indian country has been held to be within the legislative power of Congress. (*United States* v. *Tobacco Factory*, 1 Dillon, 264.) But this case, too, was within the legislative power of Congress because it was a police regulation meant to preserve the power in Congress to collect its revenues anywhere within the limits of the national domain, and did not otherwise interfere with the collective or individual rights of the Cherokees under treaty agreement with the United States.

The statute regulating immigration as a part of the commerce of this country with foreign nations in the face of treaties, and apparently in violation of them, was upheld for reasons the same as in the enforcement of the revenue laws. The statute directing Chinese to be deported was likewise upheld as a part of that policy of municipal law which the court thought this country had a right to adopt in the face of treaty. None of these cases touch the question in the case at bar. The appropriation of annuities under treaty for purposes not provided for in the treaty present an essentially different state of affairs. The agreement to pay the annuities partakes of the character of contract. "A treaty in its nature is a contract between two nations, not a legislative act." (*Foster* v. *Nelson*, 2 Pet., 253.) This is true of treaty

stipulations with the tribes who have been allowed treaty rights, and should be dealt with in respect to the things conceded or promised the same as any other treaty-making power. Such treaties must be accepted and acted on as treaties within the meaning of the Federal Constitution. (*Turner* v. *American Public Missionary Union*, 5 McLean, 344.) "The language used in treaties with the Indians should never be used to their prejudice." (*Worcester* v. *Georgia*, 6 Pet., 515.)

The treaty between the United States and the Sioux, which included the Ogallalas, made and concluded April 29, 1868, and which became effective by proclamation February 24, 1869, provided for the reimbursement of the injured person "from the annuities or other moneys due and to become due to them under this or other treaties made with them by the United States on account of depredations." This provision of the treaty of 1868 related to such depredations as should be committed after that time. The obligation was not retroactive in any sense. The consideration for the payment of the annuities was the relinquishment of all right to occupy permanently the territory outside the defined reservation; to withdraw all opposition to the construction of the railroads then being built on the plains; to not attack any persons at home or traveling, and to refrain from the capture and slaughter of white men. The particular opposition to the construction of the railroad then being built westward to the Pacific was withdrawn, and finally it was agreed by the tribe that they would regard a particular reservation their permanent home. The right to change the appro-

priation to be made by the United States to the tribe to other purposes was limited if it should appear that the amount of money needed for clothing under the tenth article could be appropriated to better uses for the Indians named therein.

There was an express clause in the treaty that "in no event *shall the amount of this appropriation be withdrawn or discontinued for the period named.*" That period was fixed at thirty years for the payment of annuities. To arrest the payment of these annuities now and to divert the appropriations for the payment of stale claims antedating the treaty which promised the payment of annuities for thirty years for specific purposes other than the payment of claims for depredations committed before that time is arbitrary and in violation of a contract too solemn to be ignored, unless it be held that Congress has the right to do just what it pleases with respect to the whole matter independent of the treaty obligation. Such an unwarranted use of the annuities as the payment of claims not contemplated or agreed to be paid when the Indians relinquished their lands in 1868 would be punishment; and in this case it would be punishment for offenses *ex post facto* and without trial. It would be a legislative sentence of such a character as certainly makes apt the words of Chief Justice Fuller in another case, which, though not accepted by the majority of the court as applicable where Chinese were to be excluded, would certainly seem applicable to the case at bar. Such a procedure "contains within it the germs of the assertion of an unlimited and arbitrary power, in general, incompati-

ble with the immutable principles of justice, inconsistent with the nature of our Government, and in conflict with the written Constitution by which that Government was created and those principles secured."

Independent of the statute of limitations and the question of whether the Indians were in amity or not, the treaty subsequent to Leighton's loss assumed there had been war, and the new treaty relieved the defendant Indians from liability for the depredation charged. The absence of a stipulation in the treaty for reparation for the damage done the claimant was in itself an amnesty which constituted a political decision that acts that might by their motive and effect be treated as offenses should not, for reasons of state policy, be considered so after that time. Amnesty is an oblivion of the past, and the end of peace was to bury the past. International law writers declare that even if a treaty of peace is wholly silent on this head, the amnesty, by the very nature of the peace, is necessarily implied in it; that all damages caused during the war are likewise buried in oblivion; and that no action can be brought for those of which the treaty does not stipulate the reparation; they are considered as having never happened, although the effect of the compromise of amnesty can not be extended to things which have no relation to the war that has terminated by the treaty, yet those things which happened during the war are obliterated by the ordinary treaty for future peace. (Vattel's Law of Nations, p. 439.)

AMITY, OR THE WANT OF THAT CONDITION, AS APPLIED TO THE FACTS OF THIS CASE.

What is amity in the sense of the statute? And what did Congress mean by imposing that as one of the conditions essential to be proved before claimant should be entitled to recover? Has the term any special significance, or is it an empty phrase? And is there anything in its use of a limited and technical character, or is the word to be taken in its broad and ordinary meaning? And if not in its usual sense, then why not? When treaty-making powers agree to live in amity with each other, shall we understand this to be an irrevocable agreement for peace regardless of future differences between the parties, and that amity is the legal condition because the treaty exists, notwithstanding the rupture of peaceful relations between the parties? If the existence of treaty between powers establishes the status of amity until a declaration of war by the political departments of the respective Governments, then, in many cases, war would be the real condition, while in law the status would be peace. Such a construction of the meaning of amity appears not only unreasonable, but even absurd. Nevertheless, it is urged with much earnestness in this case that the existence of the treaty of 1865 with the Sioux constituted peace at the time of the losses sued for within the meaning of the statute, although the evidences of actual hostility have been shown to be such as to justify the court below in finding war to be the real state of affairs between the tribe and the United States.

When recently the President issued his proclamation against filibustering in behalf of the Cuban revolutionists in armed resistance to the authority of the established Government of Spain, "a power with which the United States are and desire to remain on terms of peace and amity," did the proclamation mean actual peace, or did it mean a treaty providing for peace between the United States and Spain? Does anyone presume that such a proclamation would or could have been issued by the President of the United States but for the actual relation of peace between the two Governments named? As a matter of fact, the "good understanding" between the parties to any treaty may and often does exist on paper merely, while actual hostilities are in progress. No better illustration of this can be found than in the historical fact that before the passage of the act of Congress of May 13, 1846, which recognized a state of war as existing between this country and Mexico, two battles had been fought between the troops of the two Republics. The treaty of 1865 between the Ogallalas and the United States contained the acknowledgment of the tribe that they were thereafter to cease hostilities against the persons and property of our citizens. But the engagement was reciprocal and bound our Government and people to the same thing as to them. For some cause or other the treaty became inoperative and ineffective soon after it was made. The Indians made armed resistance to the authority of the Government and brought to bear all their tribal power in contending with the troops of the United States until compelled to yield. It is unnecessary now and here

to enter into the question of who became responsible for the outbreak, but it is enough to say that the Indians claimed that promises had been broken by the acts of the whites, and that their conduct was in retaliation and in defense of rights guaranteed by solemn treaty. Be this as it may, hostilities did begin and became so general as to assume the dignity of what is known as an Indian war. The facts are now historical, as I shall presently show.

If the amity relation was the equivalent in law to the treaty relation, and the existence of a treaty was conclusive of the condition of peace during which the agreement to pay for depredations from annuities revived, then the Government gave a premium to white men to take the risk of breaking the peace in possessing themselves of Indian lands and stock and committing wrongs upon them for which the Indians could not retaliate except at the risk of being compelled to pay for whatever they took from white men because of the paper agreement.

But it is argued that the relations of the Indians were never those of actual war, but that they were merely engaged in depredations; that the political departments of the Government never treated the acts of the Indians as war, or engaged in war against them, because there were no operations carried on against the tribe, the only military connection of the United States with them being the building and retaining of forts in what the Indians claimed to be their country. It is asserted that the Indians never encountered the troops of the United States in a body, but admitted that they did make assaults on

emigrants and upon scattered soldiers, the United States in the meantime persistently refusing to follow or punish the Indians or otherwise engage in war, by reason of which amity in fact was preserved. The findings do not sustain the contention.

The legal essentials of war are said to have been lacking at the time of this depredation because the President and Congress did not treat the acts of the Indians as war, involving the consequences of that state or condition of affairs, and it is claimed that if this was the case the courts can not declare the acts of the tribe to have constituted war. This is a mistake as to the President. The use of troops is presumed to have been by his authority.

War may be political, it is true, and it is not every act of tribal insubordination that either presupposes or proves the existence of that condition among the Indian tribes. I deny, however, that the existence of what we know in our history as an Indian war was ever determinable by legislative acts. Indian troubles amounting to actual war was frequently the condition in the Territories when the Government determined nothing relating to the hostilities except to send troops to meet the emergency. It sometimes happened that the Government was unable to make response in time to suppress tribal insurrections in advance of the wholesale massacre of exposed settlements, but upon the arrival of troops from the nearest posts the offending bodies of armed Indians were put to rout or to the sword, as the case might be, and the whole thing was over before the legislative or executive departments of the Government could take action. The policy of the

United States is not now and never has been such as to make or declare war against the Indian tribes.

In view of the relations which the tribes have ever sustained to us, a declaration of war by the United States against any particular tribe within our borders would have been in violation of the beneficent policy of our Government from the beginning. The tribes have been, and will always continue to be, under the sovereignty and dominion of the United States. They are domestic nations; their relation to us resembles that of a ward to his guardian; they are in a state of pupilage whose citizenship must depend upon us and not depend upon each Indian for himself. But they are a people separate and distinct from us. We have recognized their habits and usages. They are distinct, semi-independent, political communities, retaining their original natural rights with the single exception of that imposed by irresistible power. They are "nations." They have been accorded treaty rights, and this includes such rights as may properly belong to belligerents. They are a people capable of maintaining the relations of peace and war. (*Cherokee Nation* v. *Georgia*, 5 Pet., 1.) The doctrine early announced "that the Indians could not commit treason against the United States" (*Worcester* v. *Georgia*, 6 Pet., 583) has been conceded ever since that doctrine was announced. The personal, legal, and political status of the tribes has been governed by principles too well announced by the decisions of this court to need further elucidation. (*United States* v. *Holliday*, 3 Wall., 407; *The Kansas Indians*, 5 Wall., 737; *The New York*

Indians, Ibid., 761; *United States* v. *Forty-three Gallons of Whisky*, 93 U. S., 188; *Holden* v. *Joy*, 17 Wall., 211; *United States* v. *Kagama*, 118 U. S., 375.) These authorities amply sustain the decision that the act of an Indian in killing an army officer is justifiable if committed in war, and the hostility of the tribe relieved the act of its criminality. (*Case of Plenty Horses.* See Report Secretary of Interior, 1891, p. 132.)

The point has been made that the political status of the Sioux Nation was definitely changed by the act of March 3, 1871 (16 Stat. L., 566), forbidding future treaties with Indian tribes. (Rev. Stats., 2079.) This statute reduced the Indians from the status of nations, it is claimed, who could be at peace or at war or in treaty relations, to subjects of the sovereignty of the United States. The suggestion has no application to this case. The section of the statute cited expressly provides that no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to that time shall be invalidated or impaired. The depredation in this case was committed before the passage of that act. Even if the complaint had originated since that time there is no substantial difference in the relations of the tribes to the United States. (112 U. S., 107.) Our dealings with the tribes have been substantially the same, while the utterances of the courts since that time have conceded to them every other right except that of making treaties. The same attributes of sovereignty have been conceded to them. All the rights which belong to self-government have been recognized as vested in them. While, as for-

merly, the fee in the soil has been considered in the Government, the Indian right of occupancy has still been conceded. Their right of possession of the land assigned to them has still been undisputed. In the management of their internal concerns they have still been independent. The exercise of powers involved in self-government has still given to them a distinct character as a people, and their right to make war has been granted to the same extent in that their acts in war against the people of the United States have been deemed lawful acts, not subject to the pains and penalties incident to the commission of crime and beyond punishment for murder and treason. They are no more "subjects" now than they were before the act of 1871. Nor does the "Crimes Act" go so far as to give jurisdiction to the courts of the United States for the acts of Indians committed in war.

In construing the word "amity" the court below was left to give to it only such significance as is recognized in dictionaries of standard authority. Taking it, then, in its ordinary and common signification, it was rightly held that amity indicated a state of peace and good will between the Indians on the one side and the United States upon the other.

The Century Dictionary of the English language, after giving the original Latin derivation of the word "amity," has the following definitions and illustrations:

> Friendship in a general sense, harmony, good understanding, especially between nations; political friendship, as a treaty of amity and commerce.

Hunter's Encyclopedic Dictionary defines the word "amity," as used in the ordinary language, as friendship,

harmony, mutual good feeling; when used of private persons, as opposed to quarreling; *when used of nations, as opposed to war.*

Webster's International Dictionary defines amity as friendship, in a general sense, between individuals, societies, or nations; friendly relations; good understanding, as a treaty of amity and commerce; the amity of the Whigs and Tories. It is given as synonymous with harmony, friendliness, friendship, affection, good will, peace.

The use of the word "amity" in the American part of the treaty with France in 1778 has been shown by Nott, J., in *Lore* v. *United States et al.* (29 C. Cls. R., 332) to be accidental. The translator who rendered the term into English naturally used "amity" as the equivalent of "amitiè." In the Jay treaty of 1794 thè term "amity" appears in the title, but the context of the instrument shows the use of the term "peace and friendship."

The phrase has been employed through a century in numerous acts of Congress and with reference to the same subject-matter—our international relations with the Indian tribes—and it must therefore be taken and used in the last statute in the same sense that it was employed in the first. The judiciary can not ascribe a new meaning to it at any point in the series of statutes; what it meant at first it means always and now. (*Lore, admr.,* v. *United States et al.,* 29 C. Cls. R., 332.)

It is urged that any attempt to solve the problem of the true meaning of the amity clause of the law by resort to dictionary definitions is necessarily inconclusive and misleading, because the leading clauses of definition of

the word "amity" deal with individual motive and action and belong to the domain of sentiment and emotion. But this court has said that it will take judicial notice of the ordinary meaning of all words in our tongue. Dictionaries are admitted, not as evidence, but as aids to the memory and understanding of the court. For instance, tomatoes are "vegetables," and not "fruit," within the meaning of the tariff act of March 3, 1883, section 121. (*Nix* v. *Hedden*, 149 U. S., p. 304.)

Inasmuch as the word has no place in legal writings and can not be found in the law lexicons, its use is suggestive of the conclusion when found in a statute that it has no meaning other than that found in the dictionaries. Where nations or belligerents have made use of the term it is indicative of friendly relations. Its meaning is just as well understood as the term "hostility." The one relation is the antithesis of the other condition. Congress knew this, and also knew that the Indian tribes were sometimes in amity and sometimes in hostility, and in making provision for the payment of the claims of our citizens on account of depredations occurring when amity was the condition Congress recognized that some other condition might exist. The use of the term is a recognition in the statute itself that the hostile relation might follow the amity relation, and that the conditions thus changed were such conditions that Congress meant to impose to prevent recovery in the one case while providing relief in the other.

The findings show here that amity did not exist between the United States and the Ogallalas at the time

of this depredation. The objections to the findings are in the nature of a special demurrer to the evidence, and will now be considered in connection with the appendix herewith filed as a part of this brief (under separate cover) as Appendix A.

It goes without saying that the Indians will fight, and it is even thought by those most familiar with their propensities that they love to fight. The Sioux tribe are accounted among the finest specimens of wild men on earth. Nickelet, Catlin, and others who have written about the Indians say that the Sioux are a brave and warlike people. For a generation they were our devoted friends. They became hostile to us as the result of the act of an army officer, it is said, who recklessly fired upon a squad of the tribe and killed a chief. The Indians rallied and exterminated the command. The result was war, which cost the United States $1,000,000.

That the Sioux did fight is amply proven by the several treaties of the United States with the various organizations of that tribe, which included the Ogallalas. The treaty of 1825 was followed by the attempted but unratified treaty of 1851; and that, in turn, was followed by the treaty of 1865, and upon the termination of hostilities in 1868 a final treaty was made with all the Sioux, which is yet in force. This last treaty was made and concluded under the authority of the United States by General Sherman and other commissioners duly empowered to act for the Government; and on the part of the Ogallalas it was executed by the chiefs and headmen of that tribe. It is known as the second treaty of Fort

Laramie. The preamble of this treaty contains an express declaration that both the United States and the Indians desired peace, and both parties to the agreement pledged their honor to keep the peace. There is a distinct declaration that "from this day forward all war between the parties to this agreement shall forever cease." The very execution of such an agreement presupposes an actual state of hostility between the parties who made it. (Treaty of 1868, 15 Stat. L., 635.)

It was a vain thing to do if the United States made such an agreement and there was no war. The ratification of the agreement by the political departments of the Government ought to be a sufficient answer to the contention that there had been no hostilities. The only question that would seem to be open is the precise time when such hostilities began and when the warfare actually ended. But that time has been fixed by the findings of fact in the court below and the question of time settled. The Ogallala band of Sioux Indians, with Red Cloud as their leader, was at the time of the depredation upon Leighton's property in armed hostility against the United States, resisting the military authority of the Government in the opening of a military road and the establishment of military posts. It is interesting, if not important, in this connection to say that it was the one Indian war in which the Sioux indignantly rejected all overtures for peace and the presents which usually accompanied these overtures for the cessation of hostilities, and insisted upon their right of occupancy of the ground proposed to be taken for the Bozeman road and the establishment of military posts on reservation lands.

The result of the contention was the concession by the Government, in a subsequent treaty to the tribes, of what they claimed in that connection. In dealing with evidence the Court of Claims have the functions of a jury; and in finding facts the action of the court is equivalent to a special verdict and has the like effect. Under the rule none of the functions of a jury will be discharged by this court on the findings of the court below. The findings have, therefore, all the sufficiency, fullness, and perspicuity of a special verdict, and establish the fact of hostility, so far as hostility can be established as a fact. This court will accept as true that there were military operations, skirmishes, battles, slaughter, violence, and all the incidents which obtain in warfare. The appeal brings up for review not how much hostility there was, but whether the Indians could be hostile at all. This court can only apply the law to the established facts. (5 Wall., 419, and 7 C. Cls. R., 2; 93 U. S., 607, and 12 C. Cls. R., 33; 18 C. Cls. R., 289, 705; 111 U. S., 609; 6 Wall., 101, and 7 C. Cls. R., 11; 116 U. S., 154; 20 C. Cls. R., 508; 26 C. Cls. R., 109.)

If the findings are not sufficient to show that the internal forces operating against the authority of the Government were of a character sufficient to destroy the amity of the Sioux at the time of Leighton's loss, then it may be as well admitted that none of the Indian tribes could go to war, and that once in treaty they were always in amity.

The instances urged of the actual exercise of military force against the subjects and in the territories of other

nations which have never been considered to constitute war nor as leading to war do not, in my view, sustain the proposition that the hostilities of the Sioux in 1867 fell short of the amity imposed by the statute. The invasion of Florida, then Spanish territory, by General Jackson in 1814, and again in 1818, where there were demonstrations of military force by our troops, and the destruction of a Danish fleet by an English force at Copenhagen in 1800, do not touch the question here. Still less does the instance cited of the maritime operations between the United States and France between the years 1798 and 1800, which it is claimed did not constitute war or interrupt the status of amity, prove anything for the claimant in this case. It is true the Court of Claims in the case of *Gray, administrator*, v. *The United States* (21 C. Cls. R., 340) held, concerning the question of whether war existed between America and France prior to the treaty of 1800, that the judicial department must follow the political. But the question involved in Gray's Case had a higher interpretation by the Supreme Court of the United States in *Bas* v. *Tingy* (4 Dall., 37), a case involving the amount of salvage to be allowed for recapture from a French cruiser during that time. This court held the state of affairs mentioned did constitute partial warfare, and for the purposes of the case France was an enemy and the condition of amity was broken. The reports and opinions of the statesmen of that and a later period who were called upon in the course of official duty to consider the character of these matters only prove that there was no such thing as a *general war*, but these

reports and opinions do not overthrow the decisions of this court. Moreover, the later opinions of the Court of Claims as to what constituted a state of actual hostility with the savage tribes within our borders disposes of the case of Gray as an authority here.

A qualified state of hostility would meet the requirements of the defense under the act of 1891. It might be one of those kind of wars which claimants are pleased to term *quoad hoc*, and yet be such a want of amity as to preclude recovery.

Upon the proposition that it is incompetent for the court to find the fact of war because of the absence of some distinct declarations of that condition by the political authorities, it is enough to say that the provision of the Constitution (Article I, sec. 8) placing in Congress the power to declare war is applicable in general to a national or foreign war, and that the failure of Congress to declare a state of war with any particular Indian tribe does not necessarily determine the fact that there were no hostilities. There was executive action, and that is sufficient.

Civil war may exist without a public proclamation, and a war against insurgents, dependent States, or powers, requires no public proclamation. (*Prize Cases*, 2 Black, 666.)

Without citizenship, without civil and political liberty, and dependent to such an extent as to be at the mercy of Congress, it would have been a vain thing to have declared war against the Indians. There can be no analogy whatsoever between the hostile acts of savages and the acts of citizens or subjects in the matter of making war.

The comparisons of the acts of the tribes and the acts of citizens or subjects are wholly inadmissible in determining the legal effect resulting from the acts of the tribes and the acts of citizens and subjects. The status of amity impressed upon citizens or subjects by law grows out of the relation which such citizens sustain to the government of which they are members and subjects. The status of hostility which may be assumed by our Indian tribes grows out of their power *per se* to exercise the rights of belligerents, which in our relations to them have always been accorded. In all that class of cases defining the legal conditions which existed during the late civil war, of which the case of *Texas* v. *White* (7 Wall., U. S., 700) is the most notable expression, this court treated the action of the people in the seceding States as a rebellion with the privileges and consequences growing out of a state of belligerency, but holding that the constitutional relations and status of the seceding States remained unchanged. Belligerency was one of the consequences conceded because of the magnitude and character of the war. The status of the citizens engaged in the war upon the Government remained unchanged, otherwise the State must have become foreign and the citizens in those States foreigners.

Does it argue anything against the broken amity that the United States endeavored to suppress Indian hostilities by the payment to such of the Indians as were willing to accept the annuities appropriated for that and other purposes? Our Government had assumed to protect the tribes as the wards of the nation. In a late case before

this court it was said that they were and are now largely dependent upon us for their daily food; dependent for their political rights, receiving nothing from the States, and dependent upon us for protection. Because of the local ill-feeling the people of the States where the tribes are found are often their deadliest enemies. From the very weakness and helplessness of these Indians, so largely due to the course of dealing of the Federal Government with them and the treaties which promised them protection, there arises the duty of protection and with it the power. This always has been recognized by the Executive and by Congress and by this court whenever the question has arisen. (*United States* v. *Thomas*, 151 U. S., 585.) The right, however, of the tribes to govern themselves is still given to them by the United States.

The claimant was a sutler in the army. He had secured from the Government the right to sell goods to the soldiers at the posts along the Bozeman road. He had contracts for furnishing hay and wood. They were profitable contracts, and the claimant possessed the monopoly in these contracts for selling goods to the soldiers and hay and wood to the Government. He voluntarily carried his property to the army, where he was liable to have his property depredated upon. He exposed himself and his property voluntarily and knowingly to the dangers incident to army service in so far as a sutler could do so. He was with the army as a part of it, and thoroughly identified with its operations. He was no more entitled to claim relief from the Government for

depredations committed upon his property than any officer of the command or any private in it for losses of their property inflicted by hostile Indians. It is a universal principle that an action to recover the value of private property taken by an enemy in time of war can not be maintained. (*Cassius M. Clay* v. *The United States*, C. Cls. R., No. 21; *Joseph Loranger* v. *The United States*, C. Cls. R., No. 96; Vattel's Law of Nations, ch. 15, sec. 232; *Mary A. Williams* v. *United States*, C. Cls. R., p. 231, first session, Thirty-sixth Congress; *Peter M. Paillet* v. *United States*, C. Cls. R., 220, first session, Cong.; Rep. Com. second session, Twenty-fifth Congress, 351; Am. State Papers, vol. Claims, 222).

But it is urged that the hostilities waged by the Sioux against the United States were the acts of individuals acting on their own responsibility; that there is no evidence that the tribes regarded themselves at war, and, inasmuch as it is not shown that the Sioux were fighting as a nation and in a tribal and corporate character, their acts did not constitute what the authorities define to be a lawful war (*justum bellum*). This line of argument is pressed with the further suggestion that the defense has not shown that the Sioux in council determined upon war, or that they announced hostile purposes through their chiefs or governing body possessed of authority to declare the tribal status and policy.

There are several answers to this argument of the claimant. In the first place, it is not incumbent upon the defense to prove the character of the warfare after hostilities have once been shown to exist. In the second

place, the condition of amity imposed by the statutes is broken by any kind of hostilities which calls for the military force of the United States to suppress the same. In the third place, a war in due form which in international law is called a regular war, because certain rules are observed in it, necessarily existed between the United States and the Sioux in 1867, because both the parties to the controversy dealt with each other, barring the savagery of the combatants on one side, in the same way that other belligerents in ordinary warfare dealt with each other. The peace treaty which settled the controversy proves the answer.

The doctrine quoted from Vattel that hostilities waged without authority constituted an informal, illegitimate war, and is therefore a depredation, has application to those enterprises assembled purely for spoil and plunder. Predatory expeditions of banditti, the cruises of buccaneers in time of peace without commission on the high seas, and the depredations of pirates, belong to the class of illegitimate and informal expeditions, which, in the law of nations, can not be recognized as lawful warfare. For instance, pirates may be lawfully captured by the public or private armed ships of any nation in peace or war, for they are *hostes humani generis*. (*The Marianna Flora*, 11 Wheat., 1). A nation attacked by buccaneers and pirates upon the high seas and by armies of robbers upon land is under no obligation to observe the rules prescribed in formal warfare. A notable example of this is that of the Savoyards whom the inhabitants of Geneva

caused to be hanged as robbers, who had come to attack the city of Geneva without cause and without any intimation of hostile purposes.

The case is different here. The United States made no pretense of dealing with fighting Indians as robbers, murderers, or violators of the laws of the land. The tribes had national or tribal rights. The Sioux in 1867 were dealt with as all hostile Indians from the beginning of our relations with the tribe. They were put to the sword in battle, and when conquered were put upon rations and reservations, while in the meantime our Government was taking charge of their hunting grounds for the public domain and the benefit of citizens of the United States under treaties providing for the consummation of these objects of the Government.

Any other course adopted by us would have resulted in the final extinguishment of every Indian on the continent except a few spared for show purposes, and delayed the civilization of the whole Western country for an indefinite period of time. The blood and treasure wasted by the United States in the meantime would have been, in addition to the cruelty of such a policy, so great that no statesman or publicist would not say that the annuities paid by treaty have been as nothing in comparison.

It has been urged in the pending case of Marks et al., and will no doubt be insisted upon in this case, as the same question obtains, that the Government contention that indemnity was not intended for depredations committed by the entire tribe is negatived by the language of section 5 of the act of March 3, 1891. The language of that section provides that "the court shall determine

* * * the tribe of Indians or *other persons* by whom the wrong was committed." The words "or other persons," it is claimed, mean individuals as distinguished from the tribe, but at any rate the liability of the tribe for its tribal acts is clearly implied.

It is difficult to see how the words "other persons" "may fairly be taken to mean individual members of the tribe." It is inconceivable that any person drafting a bill and desiring to indicate both the tribe and individual members thereof, much less one wishing to specifically discriminate between the tribe and its individual members, should use the words "the tribe or other persons." It is much simpler and much more reasonable to suppose that the words are a survival of the committee stage of the measure, where they appear with reference to white persons depredating on Indian property, the bill originally contemplating reciprocal indemnity. The words "or other persons" undoubtedly have the same origin as the words "the persons, classes of persons," in the third section, which defines the necessary allegations of the petition.

This view of the case is confirmed by the subsequent words of the same sentence. The full sentence from which the quotation has been made is—

> The court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants and against the tribe of Indians commiting the wrong when such can be identified.

Here the reference is solely to the "tribe of Indians committing the wrong." If this language, twice repeated in this sentence, is to be interpreted with the strictness and minuteness for which claimant contends, and if his view of its importance is adopted by the court, the court is authorized to consider *only* such depredations as were committed by a "tribe of Indians," and judgment could not be rendered for a depredation committed by individual members of a tribe—a conclusion which is absurd when taken in connection with the jurisdictional clause of the statute. The same method of interpretation would likewise prohibit the court from rendering a judgment against a band or nation of Indians, since here only a "tribe" is mentioned.

It is further said (see brief of Hon. A. H. Garland and others on file in the pending case of Marks et al.) that—

> The same section provides further [it is in the sixth section that this language occurs] "that the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which or by members of which the court shall find that the depredation was committed." Here is the same distinction between the tribe and individual members of the tribe; but there is no implication that individual depredations shall be paid for and tribal depredations go unpaid. On the contrary, indemnity is expressly provided for both classes of depredations.

There are two sufficient answers to this proposition.

(1) The whole act must be construed together. The language in the first section, in which jurisdiction is

given to the court, specifies only "claims for property taken or destroyed by *Indians belonging to* any band, tribe, or nation"; section 5 provides, as we have seen, that the court shall determine, if possible, "the tribe * * * by whom the wrong was committed," and shall render judgment against "the tribe committing the wrong." Section 6, relating to the future payment of the judgment, uses the words "the tribe by which or by members of which" the depredation was committed. Is it reasonable to say that these words can not be construed harmoniously with those in the other sections quoted? Or, if not, can it be held that the words used in the sixth section, which relates to a matter of bookkeeping between the United States and the Indian tribes, should control inconsistent or antagonistic matter in the first section, which defines the jurisdiction of the court, or in the fifth section, which establishes the findings necessary to be made by the court and names the parties against whom the judgment shall be rendered?

(2) Furthermore, it would not avail a claimant seeking relief under the act of 1891 to show that Congress intended such a discrimination as is contended for by claimant, even if it extended to the jurisdictional clause of the statute, for both by that and subsequent sections the subject-matter of the inquiry was limited to *depredations;* and an act of war committed by or sanctioned by the tribe as such is not a depredation and could not come within the relief provided by the act.

The declaration is made that Congress certainly did not intend to hold the tribe responsible for the acts of its

individual members and yet release it from liability for tribal depredations; to which I rejoin that the tribe is not released from such liability in proper cases. For the wrongful taking by an individual member the tribe is responsible if the taking is in a time of peace. If in time of war the entire tribe should have engaged in a depredation—or if in such time an individual member committed the wrong—the tribe is liable *for neither* depredation. Where it can be shown that in a condition of amity with us a band or a whole tribe of Indians took or destroyed the property of the citizen without provocation the liability would ensue, but never where the tribe was prosecuting its supposed rights to the extent of armed hostility.

DEPARTMENTAL PRACTICE AND CONSTRUCTION.

But it is said that the Indian Office in some of the cases before it gave careful consideration to the effect of treaty with respect to the obligation to pay where the language of the treaty was of a character similar to that in the case at at bar, and that liability for the payment of depredations was declared. In order to sustain what is claimed to be a continuity of Department construction, an early opinion of the Indian Office in the matter of Joel and Thomas R. Hedgpeth, of Leonard J. Rose, and of Robert Perkins, for spoliations alleged to have been committed by Indians in New Mexico, was presented to the court below as the beginning of that construction which culminated in the rule adopted by the Interior Department in 1886 under the act of 1885. The second opinion, arising in

the claim of Myron J. Holmes, Indian Office, No. 731 (Report of Interior Department in case of McLendon, No. 7378), was also presented. And lastly, the Department construction under which numerous allowances were made under the act of 1885 and subsequent acts is relied upon as settling the principles by which the allowance and payment of depredation claims were to be governed.

The underlying object for the introduction of these opinions and this practice of the Interior Department is to show that the course of the Indian Office was approved by the Secretary of the Interior, and was a practical construction of the words "in amity" as being equivalent to "in treaty relations;" and that under the act of 1885 and subsequent acts the obligation for payment was created by each treaty upon a mere general agreement to keep the peace independent of an existent condition of actual hostility.

In an official publication (Census Report, 1890, p. 648) is the following statement of the opinion as it purports to have emanated from the Department, to wit:

> At the request of this office the Assistant Attorney-General for the Interior Department rendered an opinion August 23, 1886, as to what claims were subject to investigation on their merits under the act of March 3, 1885, as amended by the act of May 15, 1886. This opinion was to the effect that two classes of claims came within the provisions of these acts: First, all claims on file March 3, 1885, in favor of persons who were citizens of the United States at the dates of the alleged depredations for losses at the hands of Indians whose tribe had a treaty with the United States at the time of the losses, whether

such claims were barred by statute or not; second, all claims growing out of depredations committed since December 1, 1873, because the latter part of the seventeenth section of the act of June 30, 1834 (containing the limitation clause which barred claims if not filed within three years from the date of the depredation), was omitted from section 2156 of the Revised Statutes, which is a reenactment of the first part of said seventeenth section. Thus, when the Revised Statutes went into effect December 1, 1873, the limitation clause was removed, and the bar being no longer operative, claims could be filed at any time, if for a depredation committed subsequent to that date. A recent decision, however, has placed December 1, 1870, instead of December 1, 1873, as the time subsequent to which claims may originate and still be entitled to investigation, for the reason that if the bar had not become complete by the expiration of the full time to which it was limited, it was ineffectual and inoperative. Under these decisions the claims on file have been classified as subject to consideration, and not subject to consideration. The first class comprises two groups: One of claims on file March 3, 1885, whether barred or not; the other, claims filed since March 3, 1885, but for depredations committed since December 1, 1870. The latter class may be subdivided into two groups: One containing defects curable by the claimants, and the other defects curable only by statute. Both groups may again be subdivided into several classes. (Census Report, 1890, p. 648.)

The last statement is incorrect in so far as it conveys the impression that the opinion rendered on the date referred to (which, however, was delivered by E. F. Best, chief law clerk, and not by the Assistant Attorney-Gen-

eral for the Interior Department) ruled that claims growing out of depredations committed since December 1, 1873, might be considered, regardless of the question of treaty relations. The opinion expressly held that the acts in question did not provide for the investigation of any claims not chargeable against Indians by reason of treaty obligations. The whole substance of the opinion is stated in the summary in the five following paragraphs, which are copied verbatim:

> (1) The investigation of claims provided for by these acts is confined to such claims in behalf of citizens of the United States as may be chargeable against any tribe of Indians by reason of any treaty between such tribes and the United States, including claims of this character barred by the statute, provided such claims were pending in the Department March 3, 1885.
>
> (2) It does not provide for the investigation of claims not chargeable against Indians by reason of treaty obligations.
>
> (3) It does not provide for the filing since the passage of the act of March 3, 1885, of claims barred by the statute of that date, because only such claims as were then pending were revived by the act of May 15, 1886.
>
> I am of the opinion, however, that all claims that were not barred March 3, 1885, are included within the claims to be investigated, although filed after the passage of either the act of 1885 or 1886, because the act of May 29, 1872, and the rules and regulations made in pursuance thereof, require the Secretary of the Interior to investigate such claims and make report thereof to Congress in the same manner as provided for by the act of March 3, 1885. This act and the rules and regulations adopted by

the Secretary, as provided for by said act, is not repugnant to any provision of section 2156, but provides for the enforcement and execution of that section. As no statutory bar attaches to any claim for depredations committed since the adoption of the Revised Statutes, such claims may be filed at any time.

(4) I am of the opinion that the act requires that the special report of the office on each claim shall make reference to the date and clause of the treaty creating the obligation for payment.

(5) I am of the opinion that no provision is made in either of said acts for the investigation of claims in favor of citizens on account of depredations committed by Indians not holding treaty regulations with the United States at the time of the commission of the injury.

It will be seen that although a strict reading of the language used in the third paragraph might make it include claims against Indian tribes not chargeable by reason of treaty stipulations, such a construction is absolutely negatived by paragraphs 2, 4, and 5.

The report in the Holmes and McLendon cases, *supra*, is misleading, in that the report, after falling back upon the general law to predicate liability, misquotes the trade and intercourse act of 1834. The report shows that this act was designed not for any particular tribe of Indians, "but is a general law for any tribe of Indians in amity or under treaty regulations with the Government." The seventeenth section of the act of June 30, 1834, expressly limited the obligation of the tribes to pay for depredations out of their annuities in providing that the Indians committing the depredations were in amity with the United

States. There is nothing whatever in the general law which bound Indians in treaty to pay out of their annuities unless they were in amity. The statute is silent on the effect of treaty relations.

The report assumed that amity would not exist unless there was a treaty. But this presumption of amity where there was a treaty could not be conclusive, inasmuch as it could be rebutted by proof of the actual existence of a hostile condition. A treaty of peace and friendship made and concluded between the tribe and the United States would indicate the condition of amity. But such a condition is only *prima facie* evidence of the fact and not conclusive of it.

The opinion in the Hegdpeth Case does not sustain the proposition of the claimant in the contention that the phrase "in amity" was equivalent to "in treaty relations." The opinion merely says:

> The practice of this Department seems to have been to require the existence of a treaty between the Government and a tribe of Indians before they could under its construction be considered in amity, and I am disposed to coincide in that opinion. The Indian tribes are treated with in many respects as if they were independent nations, and if so considered they could not be termed strictly and legally in amity with us without those formal steps. If that view be a correct one, then of course I have no jurisdiction, as no articles of agreement and convention were ever entered into with these Indians.

It will thus be seen that the opinion does not necessarily exclude considerations of actual hostility; that if there was a state of warfare in fact, treaty *per se* cut no

figure. The early holding of the Interior Department, therefore, would seem to have been on the exact line of the decision of the court in this case; for, in addition to the previous statement of the Commissioner of Indian Affairs (February 3, 1860), the following is given as another reason for refusing to take jurisdiction over a certain case:

> Moreover, it does not appear that these claims were ever submitted to the Indians in council, that they might be heard in their defense. It may be said that in the condition of affairs that would have been a mere formality, resulting in nothing if there were no obstacles to prevent its being done altogether; but the law demands that it shall be done, and as an executive officer I have no equity power to give relief against its positive requirement. There is another requirement that seems not to have been fulfilled: It nowhere appears that the parties claimant have never sought private satisfaction or revenge for the injuries inflicted upon them. Believing, as stated above, that I have no jurisdiction over these cases, as presented, I beg leave herewith to return the papers. (Letter of Commissioner Greenwood to Hon. W. K. Sebastian, chairman Senate Committee on Indian Affairs.)

The deductions drawn from the statement "that such liability would necessarily attach to said tribe from the relationship it bore to the Government" (Holmes's Opinion), can not be sustained by the decisions which declare the Indian status; on the contrary, these decisions overthrow the argument that because the Indians acknowledged themselves to be within the exclusive jurisdiction of the United States they are therefore bound to pay for depredations when in hostility.

The further statement that "the commission of wrong necessarily carries with it a liability to make reparation for such wrong when committed upon a citizen of the Government with whom treaty relations of friendship and amity exist" carries with it the assumption that the wrong was committed without just cause by the Indians and that they had no just cause of retaliation. Such an interpretation loses sight of the fact that belligerent rights were accorded the parties charged and that the obligation to keep the peace was mutual. It was as much the duty of the United States to keep the peace with the tribes charged as it was the duty of the tribes to observe the terms of the agreement with us. If a controversy has arisen the courts can not inquire into the question of who was responsible for first breaking the treaty, or whether the tribe was responsible for the hostile condition, or whether our people were responsible for the state of affairs that brought about depredations and other wrongs. Why should it be said that liability shall attach to a tribe for the acts of individual Indians of a hostile tribe any more than to the United States for the acts of the whites in the taking or destruction of Indian property, when there is no proof at all that the tribe inaugurated the condition or created the want of amity. The laws of Congress declare liability upon certain conditions, which in the case at bar were never complied with. The treaty itself is insufficient to create an obligation for payment; and the appeal to the trade and intercourse laws to fix liability in special cases is an admission that the treaty itself is insufficient for the purpose. The claim in this case was never submitted to the Indians in council that they might

be heard in their defense, which was an essential thing to be done. No jurisdiction, therefore, could be said to exist unless all the essential requirements had been met.

In truth, the Department rulings were not uniform, in this, that they sometimes observed and sometimes ignored the international obligation of the United States to the tribes. The true rule should have been that where a treaty of peace and friendship existed, or where, in case there was no such treaty, the condition of peace and friendship was shown to exist between the tribes and the United States, this status could not be changed to a condition of hostility by the acts of individuals of either party. But, where the condition of amity was shown to exist by the provisions of a treaty or by evidence *aliunde*, this condition should have been presumed to continue until a condition of actual war or hostility was proven. Such condition could not be changed by proof of individual depredations, but where hostility was shown to exist at any time that presumption continued until the execution of a new treaty.

That the Department rulings were not uniform, it may be stated that the Greenwood letter of 1860 was followed substantially in the course of practice of the Indian Office, as will be seen by the following exhibits:

DEPARTMENT INTERIOR,
OFFICE INDIAN AFFAIRS,
Oct. 23, 1865.

M. C. KIRBY, Esq.,
Golden City, Colorado Territory.

SIR: Your letter of 9th instant is received, making inquiries relative to your claim for loss of horses taken by the Sioux, &c.

In reply I have to inform you that this office adjusts such claims as are held against Indians who are at peace with the Government. The only redress for any other must be through Congress.

Very respectfully, your obedient servant,

D. N. COOLEY,
Commissioner.

DEPARTMENT INTERIOR,
OFFICE INDIAN AFFAIRS,
July 17, 1866.

Hon. W. E. NIBLACK,
House of Representatives.

SIR: I have the honor to acknowledge the receipt of your letter of the 9th instant, enclosing a claim of Patrick Munoy for depredations by Arapahoe Indians at Pawnee Reservation in June, 1864.

This office can afford no relief in the case. The Indians charged with the offense were hostile at the time to the Government, and, moreover, are not, it is believed, parties to any treaty providing for the payment of annuities out of which claims for depredations could be satisfied. The claimant's recourse is to Congress.

The claim is herewith returned.

Very respectfully, your obedient servant,

D. N. COOLEY,
Commissioner.

In the case of Marks et al., now pending before the court, I have attempted to show (p. 102 to 111, inclusive) that the whole superstructure of the argument in favor of the departmental construction is built upon the assumption that the Secretary of the Interior has held in opposition to the decision of the court below in the case of Marks as well as in the case of Leighton, but

that whether this be true has not been proven; and that the small appropriations made by Congress from time to time in special cases on account of such claims were under circumstances peculiar and exceptional in character, and the result of generosity rather than of right.

No formal decision was ever made by the Interior Department construing the word "amity." Its construction as being in "treaty relations" is only inferred. Congress never ratified the construction claimed for it. The action of the Secretary of the Interior was only advisory to Congress.

In the Marks brief, *supra*, I have set forth the limits of departmental construction and have taken up the cases one by one and shown, I think, that some consideration is always given to contemporaneous departmental construction, but that it is only when there is doubt or ambiguity on the face of the statute and when the statute under consideration is the same as that construed by the Department; and even then such construction is not allowed to control except in cases where the ambiguity is great, the practice of long standing, and the question one properly subject to Department construction. For a discussion of the practice and principles relating to departmental construction, and a review of the authorities in that connection, and for the argument that the authorities cited by counsel apply only to *judicial* construction, I respectfully refer the court to what I have said in my brief in the Marks Case on pages 102 to 128, inclusive.

It is proper, and often necessary, to consider the effect and consequences of a proposed interpretation of a law

to ascertain what is probably the true intent. (*State* v. *Hope*, 100 Mo., 361.) The consequences which would inevitably follow the acceptance of the conclusions sought to be drawn by the claimant from the different practice and construction of the Interior Department of claims for depredations are so unsatisfactory and subversive of the general course of legislation on the subject, that they constitute a vigorous argument against adopting the conclusions sought.

WAS IT COMPETENT FOR CONGRESS TO PROVIDE THAT JUDGMENT SHOULD BE RENDERED AGAINST THE INDIAN DEFENDANTS BY THE SERVICE OF PROCESS UPON THE ATTORNEY-GENERAL ONLY?

The fourth section of the act of March 3, 1891, provides that the service of the petition shall be made upon the Attorney-General in such a manner as may be provided by the rules or orders of the court; and that it shall be his duty to appear and defend the interests of the Government and of the Indians in the suit, and within sixty days after the service of the petition upon him, unless the time shall be extended by order of the court made in the case. The second proviso in this section authorizes any Indian or Indians interested in the proceedings to appear and defend by an attorney of their own choice, with the approval of the Commissioner of Indian Affairs, if such Indian or Indians shall choose so to do.

In the case at bar a general traverse was filed by the Attorney-General on behalf of the United States in the following language, to wit:

> And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.
>
> JOHN B. COTTON,
> *Assistant Attorney-General.*

(No other defenses or pleas were made or filed by the official who filed the above plea.)

This traverse was filed May 27, 1891; the claimant's election to reopen was filed January 7, 1893, and in this state of pleading the case went to hearing, the defendant Indians not appearing by any attorney of their own selection.

If the statute was sufficient in itself to warrant the court to proceed to judgment against the defendant Indians upon the plea filed in the foregoing manner, then the court acquired jurisdiction to render judgment against the Sioux; if the statute was not sufficient to properly place the tribe before the court, then so far as the Indians are concerned the court proceeded extrajudicially.

In the event this court shall reach the conclusion that the judgment of the court below should for any reason be reversed, then I submit the question of the sufficiency of the jurisdiction of the court over the Indians on the plea filed to this court for determination.

In another case of a character similar to that under consideration it was stated by the court below that under

the act of March 3, 1891, the inquiry as to who should be defendant was raised for adjudication for the first time in the history of the Court of Claims. In that case the court held that the civil rights incident to States and individuals as recognized by what may be called the law of the land have not been accorded either to Indian nations, tribes, or Indians; and that "due process of law" and the "law of the land" differentiate themselves as they are applied to different conditions and different subject-matters; that considering the Indians are peculiar in their relations to the United States in not having incident to them the common-law rights of suitors, their standing in the courts is purely statutory and within the discretion of the Government. It was accordingly held that the Indians are not defendants in these proceedings in the sense of being distinct from the United States entitled to notice, and the service of the petition upon the Attorney-General was adequate to give the court jurisdiction of the tribes. (*Jaeger* v. *United States and the Yuma Nation of Indians*, 27 C. Cls. R., 282.)

The theory of this decision is that the General Government, in its legislative and executive departments, is the special guardian of the Indians, and that if the tribes have funds in the custody of the public Treasury, the United States have a perfect legal right to deal with the funds as they see fit, and the reference of a question to the courts affecting the integrity of the funds does not confer upon the Indians the legal rights incident to suitors. The Jaeger Case was subsequently dismissed for reasons independent of the question relating to the service

of process, and without waiting for an appeal to be taken in any other case that will present the question, the court is now invited in this case to give to the act such interpretation as the situation will warrant relating to the question of jurisdiction of the Indians by the service of the process upon the Attorney-General only.

It may be objected that, inasmuch as the matter of jurisdiction was not more directly raised in the trial of the case in the court below, this court can not now pass upon the question. But parties to suits and the acquirement of jurisdiction to render judgment against parties upon the service of process directly involve fundamental principles, it being axiomatic that judgments rendered without the service of process upon persons are *coram non judice*. Such an objection is founded on a mistaken view of the rights and authorities of appellate courts. In this case it would be peculiarly so because the want of any service at all upon the Sioux is apparent upon the face of the record, and whatever appearance there is for the tribe is under the command of a statute which it is now proposed to question.

Inquiry into the jurisdiction is limited to the facts appearing on the record in the first instance. "This has been often so held in the enforcement of the inflexible rule which requires this court in the exercise of its appellate power to deny the jurisdiction of courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called upon to act." The consequent defects in the jurisdiction of the court, if apparent, may be reached "at

any stage of the proceedings." (*Coal Company* v. *Blatchford*, 11 Wall., 178; *Peper* v. *Fordyce*, 119 U. S., 469; *King Bridge Company* v. *Otoe County*, 120 U. S., 225; *Cameron* v. *Hodges*, 127 U. S., 322; *Hegler* v. *Faulkner*, 127 U. S., 482; *Metcalf* v. *Watertown*, 128 U. S., 586; *Morris* v. *Gilmer*, 129 U. S., 315; *Chapman* v. *Barney*, 129 U. S., 677; *Anderson* v. *Watt*, 138 U. S., 694; *Parker* v. *Ormsby*, 141 U. S., 81; *Denny* v. *Pironi*, 141 U. S., 121; *Colorado Central Consolidated Mining Co.* v. *Teuck*, 150 U. S., 138.)

It is admitted that our relations with the Indians are anomalous, there being nothing like it in the history of any other Government; that an Indian tribe or nation within the United States is not a foreign State within the sense of the Constitution (5 Pet., 1); that the Indians are under the direction of the General Government, to be kept separate and subordinate and dependent (*Lariviere* v. *Grant*, 3 Otto, 188); that they are wards of the nation—pupils, dependent communities (*United States* v. *Kagama*, 118 U. S., 375); that the recognized relation between the parties is that of superior and inferior. (*Choctaw Nation* v. *United States*, 119 U. S., p. 1.)

But the fifth amendment to the Constitution declares:

> Nor shall any person * * *. be deprived of life, liberty, or property without due process of law.

The Indians in the case at bar are entitled to annuities under a treaty. Are they "persons" within the meaning of the fifth amendment, and is the guaranty of the Constitution any guaranty to the tribe?

The fourteenth amendment also provides as follows:

> Nor shall any State deprive any *person* of life, liberty, or property without due process of law, nor deny to any *person* within its jurisdiction the equal protection of the laws.

Being persons, *not citizens*, the Ogallalas would stand under the Constitution in the same relation to the Government of the United States as *aliens* residing in our territory with respect to life and liberty. Under the *habeas corpus* act of Congress an Indian is a *person* within the meaning of the laws of the United States, and may take the writ in a Federal court or before a Federal judge in all cases where he may be in custody under color of authority of the United States. (*United States ex rel. Standing Bear* v. *Crook, Brig. Gen.*, 5 Dill., C. C. R., 468.) The inherent right of expatriation and the privilege of taking the writ of *habeas corpus* are applicable to all persons, whether citizens or not, unlawfully restrained of their liberty. (*Case of the Hottentot Venus*, 13 East, 195; *Case of Dos Santos*, 2 Brook., 493; *In re Kaine*, 14 How., 103; *Ex parte Reynolds*, 5 Dill., 394; *Ex parte Kenyon*, 5 Dill., 385.) The principles of these decisions have been approved in *Elk* v. *Wilkins*. (112 U. S., 108.)

What other rights, we may then ask, have aliens? And what protection under our Constitution and in what respect with regard to their rights of property do the terms and requirements of the Constitution differentiate themselves as applied to persons of the Indian race from the application of these terms and requirements to the rights of aliens?

One right that an alien may have on our soil is to be protected in that guaranteed by the seventh amendment to the Constitution, which reads as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

Another right guaranteed to all *persons* within the United States is that no person shall be required to answer in damages nor have a personal judgment rendered against him in any court in the United States, except the service be had upon him in the district in which he resides or where he may be served. By district is meant the territorial jurisdiction of the court from which the process issues.

Another right guaranteed to *every person* resident within the United States is, that before a court is authorized to render judgment against him on a money demand, a process or citation of some kind from such court shall be served upon him.

Section 911 of the Revised Statutes, second edition, providing the essentials of process, is as follows:

> All writs and processes issuing from *the courts of the United States* shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a circuit court shall bear test of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear

> teste of the judge, or, when that office is vacant, of the clerk thereof. The seals of said courts shall be provided at the expense of the United States.

Upon what principles are these rights guaranteed by our Constitution and laws to every resident person of whatsoever color or nationality within our borders and denied to the Sioux who reside in South Dakota?

In construing the words "due process of law" used in the fourteenth amendment of the Constitution it has been said by this court:

> They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution, that is, by the law of its creation, to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State or his voluntary appearance. (*Pennoyer* v. *Neff*, 95 U. S., 733.)

While the Ogallalas have no more rights as citizens within the meaning of the amendments to the Constitution than the children of subjects of any foreign government born within the domain of that government, I do not understand from the expressions of this court that the same rules as apply to white persons deprived of their liberty may not also apply to Indians in the appropriation of property to be taken in judicial proceedings.

There is another aspect of the case that I will consider. There are $3,000,000 in the Treasury belonging

to the Sioux generally. They are trust funds having their origin in treaty stipulations. A treaty is a compact formed between two nations or communities having the right of self-government. (McLean Opin., *Worcester* v. *Georgia*, 6 Pet., 580.) Does not our treaty with the Sioux admit the power of that tribe to bind themselves and to impose obligations on us; and shall we withdraw annuities provided for them without notice, against the terms and conditions of the treaty, on the ground that they are our dependents and wards, and therefore the subjects of arbitrary legislation? It is said the United States owes the tribe protection. But "protection does not imply the destruction of the protected."

If the Sioux are our wards, under what rule of law can we say that the United States shall as the guardians make the defense, perfect as it may be, without serving notice on the ward whose property is to be affected? If the relation of guardian and ward exists, the ward can not make any defense independent of his guardian, nor can the differences between the guardian and ward be adjudicated in the same proceeding in which the ward through his guardian has been sued by a third person; nor can a judgment be rendered binding the property of the guardian or the property of the ward beyond that in the actual or constructive possession of the guardian.

Upon the theory that the Government is trustee for the Sioux, the defendant tribe can assert that a proceeding against a trustee is essentially a proceeding *in rem*, and a judgment can only be rendered to bind the property at the time in the hands of the trustees; and before such

judgment can be rendered it must be made clearly to appear to the court what the exact relations existing between all the parties are, and why it is necessary to resort to proceedings *in rem* in the first instance.

An examination of section 4 of the act of March 3, 1891, provides for set-off, yet no counterclaim can be effectually presented without some sort of notice.

The power conferred on the Federal Government by the Constitution to regulate trade and intercourse with the Indians has never given us the right to claim or exercise *political* jurisdiction over the tribes. We assert and exercise sovereignty over them, and make regulations in the exercise of the police power to the end that they may be made to behave themselves. But we also agree by numerous treaties to protect them in whatsoever rights we have accorded to them under treaty or contract of any kind. These rights include annuities payable for specific periods of time, and, as we all know, originated in the contemporaneous agreement of the tribes to relinquish lands, get on reservations much more limited than the territory previously occupied by them, and to cease hostilities against us. Such agreements in the dealings of all civilized nations carry amnesty for past offenses, extinguishment for all previous demands and claims of the treaty-making parties. The like agreements have the same effect in the dealings of this Government with the Indian tribes. Certainly the tribes have ever understood the agreements in this light, otherwise many of them might not have been made. In the present case against the Sioux the treaty of 1868 obliterated claims for depredations occurring before that time.

On a bill filed by the Cherokees under an act of Congress granting the right of way through reservation land to the Southern Kansas Railway Company, this court held that the Government may exercise the right of eminent domain in respect to lands in the Territories as in any of the States for the purposes necessary to the execution of the powers belonging to the General Government, but the court also held that the act contained a sufficient provision to secure just compensation, and that the title to the reservation lands did not pass from the owner until such compensation was actually paid. The decision carries with it the same recognition and respect for the property rights of the Cherokees as if they were citizens of the United States although they are not citizens. (135 U. S., 642.) It recognizes them as "persons" entitled to notice and compensation before their rights of property are invaded.

The withdrawal of the funds of the Sioux for the payment of depredations in a suit against the tribe includes a question of personal liability upon each Sioux, inasmuch as every individual member of the tribe is affected by the judgment of the court which shall make the annuities liable. While the judgment may not be enforced against the tribe by execution, yet if Congress has the power to pass a law providing for the payment of depredations from the annuities without sufficient treaty provision or previous law authorizing the withdrawal of such annuities for the purpose, the same power could also provide by law for the withdrawal and appropriation of annuities to any other purpose deemed sufficient by Congress. This power the tribes deny.

Especially is this power denied by the Sioux who have become detribalized and are becoming so under the general allotment act of 1887. It is well known that some Indians have abandoned the tribal relations and others are doing so. The Dawes act of 1887 provided for the allotment of lands in severalty and declared all Indians born within limits complying with certain conditions to be citizens. The acquirement of citizenship under this law would not deprive any individual Indian from any share he might be entitled to possess in annuities provided for by treaty.

There are no means of determining the number of Indians who have become admitted to citizenship by voluntarily taking up their residence separate and apart from their tribes and adopting the habits of civilized life. But under the allotment act over 10,000 Indians have secured admission to full citizenship, according to the records of the Indian Office. Since the passage of the act allotments have been made to several thousand more. The act of 1891 has ignored the rights of those Indians who have acquired the rights of citizenship by the act of 1887, as well as those rights guaranteed by our Constitution and laws to every resident person, of whatsoever color or nationality, in failing to provide for the service of process upon those whose property is sought to be taken on individual account in this suit. In any event, the judgment of the court below should be affirmed.

CHARLES B. HOWRY,
Assistant Attorney-General.

Office Supreme Court, U. S.
FILED
OCT 19 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ALVIN C. LEIGHTON, APPELLANT,
v.
THE UNITED STATES AND THE OGALLALLA Sioux and other tribes of Indians, appellees.
No. 413.

APPENDIX A TO BRIEF OF CHARLES B. HOWRY, ASSISTANT ATTORNEY-GENERAL, FOR APPELLEES.

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The trouble with the Sioux, which lasted from 1864 to 1868, received fresh impetus from the massacre of the friendly Cheyenne Indians under their famous chief, Black Kettle, at Sand Creek, Colorado, in December, 1864.

> Exasperated and maddened by this cold-blooded butchery of their women and children, disarmed warriors, and old men, the remnant of these Indians sought the aid and protection of the Comanches and Kiowas, and obtained both. The combination which followed embraced all the tribes of the plains from the Red River of the South to the Red River of the North, and resulted in the general Indian war of 1865, which cost our people many valuable lives

> and $40,000,000 in money. Peace was concluded with the southern tribes in October, 1865. Peace was likewise made with the Missouri River Indians late in the same autumn, and the Indians engaged in the recent hostilities (Sioux) gave notice that they also were willing to bury the tomahawk. (Report Committee on Indian Affairs, Senate Ex. Doc. No. 13, Fortieth Congress, first session, p. 2.)

With some of these latter Indians treaties were made in October, 1865, and upon the statute books is one assumed to have been made with the Ogallalas.

As stated by the Commissioner, they (the Sioux of the Powder River country) sent in word to Fort Sully, where the treaty commission was assembled, that they were willing to make peace. This, according to the authority of Henry E. Maynadier, colonel Fifth United States Volunteers, commanding in that region, is not strictly accurate. In a letter to the Commissioner of Indian Affairs, dated January 25, 1866 (Report Secretary Interior, 1866–67, p. 204), Col. Maynadier says:

> In October last it was thought advisable by Gen. Wheaton, the commander of the district, then at Fort Laramie, to send messengers to the Sioux to inform them that tribes were making peace and an opportunity would be offered them to do the same.

The letter then states the difficulties attending such a mission, that no white man was found who would attempt it, but that at last five Indians were found who were willing to go. It then mentions the severities of the winter and the anxiety felt up to the 15th of January, the time of the messengers' return, lest they should be

unable to accomplish their mission; and further states that he has "information that Red Cloud, the principal chief of the Ogallalas, will be here in a short time with a large band, some hundred and fifty lodges." That this is an authentic statement of the progress of events at that time is confirmed by the report of Superintendent Taylor (Report Secretary Interior, 1866–67, p. 2), who here takes up the thread and continues as follows:

> Previous to February last (1866) the great body of these western Indians were hostile and had committed many of the most wanton and cruel outrages upon the western emigration passing through the country which they inhabit. Indeed, they had become so bold and reckless that they attacked and destroyed emigrant trains within 30 miles of Fort Kearney, a point only 200 miles west of Omaha. The various military expeditions sent against them by the Government had failed to inflict upon them any serious punishment, and the young men of the tribe had come to believe that these atrocities might be continued without the slightest fear of serious consequences.
>
> The winter of 1865 proved to be one of unusual severity, however, in the region which they inhabit, and the long-continued cold weather (with snows of almost unprecedented depth) accomplished, in the interests of peace, what war, waged at great expense, had failed to achieve. In February, 1866, a deputation of Indians representing the Sioux, by far the most numerous and powerful of these tribes, reached Fort Laramie, and through an interpreter communicated with Col. Henry E. Maynadier, then, as now, in command of the district in which that important military post is situated. They represented to Col. Maynadier that their tribes were in condition of utter

destitution, without food, and scantily supplied with clothing; that their blankets were worn out, their horses and ponies nearly all dead, and that their young men were tired of war and desired the reestablishment of peace. Col. Maynadier listened patiently to the story of their destitution and sufferings and assured them that the Government was earnestly desirous that terms of peace and friendship should be reestablished. Provisions and tobacco were issued to them and they returned to their tribes.

Early in March several of the chiefs, with portions of their bands, arrived at Fort Laramie, and a telegraphic correspondence was held between them and the undersigned, who had during the preceding winter been appointed by the President a member of a commission to negotiate, if practicable, terms of peace. In that correspondence (a full report of which was at that time forwarded to the Indian Department at Washington) it was agreed, on the part of the chiefs, that all hostile action on the part of the bands which they represented should be suspended until the fixed time for the assembly of the peace commission at Fort Laramie on the 1st of June following. This agreement was faithfully observed by the Indians, and no depredations were committed by any of the lately hostile bands.

Accordingly, the treaty commission located itself at Fort Laramie in June and there made some treaties with a part of the Indians assembled. The methods used by the commission in securing these treaties were not approved. These treaties were never ratified by the United States, and so were never binding, even upon that small portion of the Indians who entered into them.

Inasmuch as the Indians had announced their desire to make peace, it may seem strange that the commission was not more successful. This is accounted for by the demands made by it upon the Indians. It demanded that the Indians should acknowledge the right of the Government to the Bozeman road and that they should leave unmolested the travelers upon it. It also insisted that the Indians grant the United States the right of establishing military posts at the base of Big Horn Mountain (Fort Phil. Kearny) and on the head waters of the Yellowstone River (Fort C. F. Smith).

The Indians occupying this country refused to grant the rights required. They realized that the use of the road meant the destruction of the game in their best hunting ground, and the reduction of themselves to the beggarly condition of those Indians who hung about the Government posts. The leader of the opposition was Red Cloud, the leading and most influential of the Ogallalas. In this he was ably seconded by Red Leaf and Man Afraid of his Horses, the chiefs of the other two bands of Ogallalas.

So certain was every one that the concession would be made by the Indians, that even while the matter was yet under consideration the military occupation of the country was begun by Col. H. B. Carrington, with the Eighteenth U. S. Infantry, who, with about 700 officers and men, arrived at Laramie en route to the Indian country to establish and occupy military posts along the Bozeman road, pursuant to General Orders, No. 33, Headquarters Department of the Missouri, March 10, 1866, Maj. Gen. Pope, commanding.

The destination and purpose of Colonel Carrington and his command was at once made known to the Indians. This they construed as a determination on the part of the Government to occupy their country by military posts even without their consent. Immediately Red Cloud, Man Afraid of his Horses, and their followers withdrew from the council and refused to return.

> The only one of the Prairie Sioux who remained and agreed to abide by the treaties were the Lower Brules, with a few stragglers from the other tribes. At that time they numbered about 2,500, but a year later, June, 1867, Spotted Tail, Standing Elk, and Swift Bear, the treaty chiefs, had with them only ten lodges, mostly of old men and squaws, the young men having gone to swell the ranks of Red Cloud. So rapid was the defection of warriors to the hostile camp that within two weeks after the passage of the troops Spotted Tail and Standing Elk told the whites that their young men had left them and gone to the Powder River country, and that parties who went far from home had best go prepared and look out for their hair. (See "Massacres of the Mountains" and Senate Ex. Doc. 13, Fortieth Congress, first session, pp. 3 and 61.)

That this occupation of the country by the military in 1866 was the event which terminated the armistice of the preceding March and plunged the Indians again into the terrible hostilities which the armistice had interrupted is still further corroborated by the following:

> HEADQUARTERS
> DEPARTMENT OF THE PLATTE,
> *Omaha, Nebr., September 30, 1867.*
>
> GENERAL: * * * That the establishment of these posts produced the exciting state of hostilities

in that country is undoubtedly true, and up to this time the Indians demand their abandonment as a *sine qua non* to any negotiation, even for that country. To yield to their demands would be regarded by them as evidence of our inability to hold them, and would, I fear, embolden them to enlarge the sphere of their hostilities, and diminish very materially the chances for a permanent peace with them. * * *

C. C. AUGUR,
Brevet Major-General, U. S. A., Commanding.

Brevet Maj. Gen. W. A. NICHOLS,
A. A. G., Military Division of the Missouri, St. Louis, Mo.

Such, briefly, is the history of the Sioux troubles up to June, 1866. This shows that hostilities had existed since 1864; that whether or not the treaty of October, 1865, was bona fide, whether or not it was made with a few or many of the Indians, properly or improperly, nevertheless, hostilities had existed and war had been continually waged from the time of the Sand Creek massacre, in 1864, up to this time, except during the period of three months covered by the armistice. This shows that the first of June was a most important period in the history of the Sioux hostilities; that whereas before this time their hostilities had been directed to the avenging of the Indians slaughtered at Sand Creek or the commission of depredations upon the white men crossing their country by the Bozeman road, now their hostilities are directed to self-protection, self-preservation. Not only were they threatened with the loss of this their last and best hunting ground, but with complete extermination. That this was so, that the Govern-

ment was still intent on war, they heard proclaimed by the tread of soldiers marching into their country to possess and occupy it. This to them was a proclamation that peace was no longer possible, that war was inevitable, and that by means of war their hunting ground, their only means of subsistence, was to be taken from them regardless of their wishes or their rights. Could a more invidious proclamation of war have been issued? Could anything else have been done which would have so determined the Indian to fight for his country and throw aside even the pretense of friendship and good feeling toward the United States and the white inhabitants?

HOSTILITIES SUBSEQUENT TO JUNE 1.

The detachment for the Powder River country moved on for the establishment of Forts Phil Kearny and C. F. Smith, and the Indians counseled for their own defense. Anything that would drive the troops from the Bozeman road—war, open and destructive, menaces, persecutions, depredations—this was the plan of the Indians, and this they followed pertinaciously. And they began at once, as is shown by the report of Gen. Sanborn, dated July 8, 1867 (Senate Ex. Doc. 13, Fortieth Congress, first session, p. 62), where he states:

> That all the Sioux Indians occupying the country about Fort Phil Kearny have been in a state of war against the whites since the 20th day of June, 1866, and that they have waged and carried on this war for the purpose of defending their ancient possessions, acquired by them from the Crow Indians by conquest after bloody wars, from invasion and occupation by the whites.

> This war has been carried on by the Indians with most extraordinary vigor and unwonted success. During the time from July 26, the day on which Lieut. Wand's train was attacked, to the 21st day of December, on which Bvt. Lieut. Col. Fetterman, with his command of 80 officers and men, was overpowered and massacred, they killed 91 enlisted men and 5 officers of our army, and killed 58 citizens and wounded 20 more, and captured and drove away 306 oxen and cows, 304 mules, and 161 horses. During this time they appeared in front of Fort Phil Kearny, making hostile demonstrations and committing hostile acts fifty-one different times, and attacked nearly every train and person that attempted to pass over the Montana road.

Speaking of the Fetterman massacre at Fort Phil Kearny, and the reasons why the Indians were able to thus utterly exterminate the troops, the report says further:

> The difficulty "in a nutshell" was that the commanding officer of the district was furnished no more troops or supplies for this state of war that had been provided and furnished him for a state of profound peace. In regions where all was peace, as at Laramie, in November, twelve companies were stationed, while in regions where *all was war*, as at Phil Kearny, there were only five companies allowed.

If more positive statements of actual warfare are needed, we have them in the closing words of this same report, where it is recommended—

> That aggressive war by the Government against the Indians at once cease, and that all our troops in the Indian country be used defensively for the garrisoning our forts, protecting our railroad interests,

lines of travel, and frontier settlements, and punishing the Indians, if possible, when committing depredations on our lines of travel or out of their own country.

On March 9, 1867, Bvt. Brig. Gen. Alf. Sully writes (Senate Ex. Doc. 13, Fortieth Congress, first session, p. 76):

> One thing, however, I think we can say with certainty, and that is that a considerable band of Indians, supposed to be all Sioux, or generally so, are in that section of the country, who are hostile to whites, and have been so for many years, and are determined to do all they can to make that country too hot for us to occupy or travel through. We see no other course for the Government to adopt than to turn them over to the military for severe punishment, and follow this band up until they sue for peace, or are driven out of that section of the country. We are not prepared at present to state the cause of this trouble, but from all we can learn it appears to date back to the late treaty at Laramie. (The treaty above referred to as never having been ratified.)
>
> Red Cloud, the reported chief of the hostile band, and his principal Indians refuse to sign the treaty or allow a road through their country. The unusual success he and his band met with in all their conflicts with the whites—military and civil—has rendered them bolder than Indians generally are.

Still further evidence of a general and extensive war in that region is found in the report of Special Agent Chandler (Senate Ex. Doc. 13, Fortieth Congress, first session, p. 13):

> Respecting the bands of Indians now at war with the United States, I think all north of the North

Platte River may be considered hostile. From information received by a friendly Indian, sent from here to the Powder River country (and who started home from the encampments of the hostile bands on the day of the massacre at Fort Philip Kearny), I learn the names of the different tribes and bands then at war to be the Minneconjous, Brules, Ogallalas, Crows, Unepapas, Blackfeet, Sans Ares, Arapahoes, a portion of the Cheyennes, and some others whose names I have now forgotten. His estimate of their strength at that time was 11,600 warriors. Later estimates have been much higher, but I think his the most reliable up to the present time. Since he was there, however, it is probable that these Indians have been reënforced. Red Cloud, Red Leaf, and The Man Afraid of His Horses are supposed to be the principal instigators and leaders in the war.

During the time from June to December the Indians contented themselves mainly with a constant worrying of the troops, attacks upon their hay and wood parties, personal persecutions of any whites they could capture, and by depredations both upon the troops and travelers along the Bozeman road. But during all this time they were maturing other plans as well.

When the troops reached Piney Creek, on July 14, the Indians gave them formal notice that they must leave the country; that Fort Reno would not be disturbed, but that no new forts could be built. Nevertheless, work was begun the next morning upon Fort Phil. Kearny at the mouth of Little Piney Creek. Two days later the post heard was stampeded and the pursuing party became engaged in a lively skirmish with the Indians, resulting in a loss to the soldiers of two killed and three wounded.

On the same day these same Indians came upon the trading establishment of Louis Gazzons and killed six men. From then until the close of the month 5 emigrant trains were attacked, 15 men killed, and much stock run off. These constant annoyances at last aroused Col. Carrington to telegraph for additional force, which he did on the 29th. Again on the 31st he requested reinforcements of Gen. P. St. George Cooke, commanding in that district.

On August 3 Fort C. F. Smith was located on the Big Horn, 92 miles northwest of Phil. Kearny, by two companies sent from the latter point, thus completing the military occupation of the country.

On September 27 P. St. George Cooke, brevet major-general, commanding, telegraphs Col. Carrington, at Fort Phil. Kearny:

> Your long telegram and others of the 27th instant received; also, copy of Maj. Van Voast's letter of September 22 to you. You must have corn before this in plenty. It is impossible to take the offensive this season, except you can manage to surprise Red Cloud in winter camps by infantry.
>
> Two or three hundred infantry, with much suffering, perhaps, might thus accomplish more than 2,000 troops in summer.
>
> I have reason to believe there are whites with the Indians. Never spare them. You can only defend yourself and trains and emigrants the best you can. There are so many conditions and circumstances connected with Fort C. F. Smith I am ignorant of, I can not order or advise; only at the worst you can recall its garrison and in such case strengthen Reno.

Having one company of cavalry, you can probably dispense with your 94 horses, after mounting all the cavalrymen. They could be used for cavalry at Laramie. The same as to any useless horses at C. F. Smith and Reno.

Gen. Myers telegraphs about Bailey's party and wages. Cartridges attended to.

The operations of the year 1866 culminated in the attack upon Fort Phil Kearny. This had been "planned for three months. All the confederated tribes had delegates. It was matured with their religious ceremonies and auguries. Their prophets foretold they would succeed and kill 100. The time of the new moon was fixed for the onslaught. It was designed, when the garrison was weakened by the absence of the wood party, the supporting party, and the reserves, who would be likely to follow, to seize the fort." (Senate Ex. Doc. 13, Fortieth Congress, first session, p. 58.) Thus we have still more positive evidence of the concerted action of the Indian tribes. They were not acting individually, but had formed a very perfect Indian military organization.

The following official telegrams sufficiently explain the condition of affairs in the Indian country at this time and the bitterness of the warfare between the troops and the Indians:

FORT PHIL. KEARNY,
December 21, 1866.
(By courier to Fort Laramie, December 26.)

GENERAL: I send copy of dispatch to General Cooke simply as a case when in uncertain communication. I think you should know the facts at once.

I want all my officers. I want men. Depend upon it, as I wrote in July, no treaty, but hard fighting is to assure this line. I have had no reason to think otherwise. I will operate all winter, whatever the season, if supported; but to redeem my pledge to open and guarantee this line I must have reenforcements and the best of arms up to my full estimate.

Respectfully, your obedient servant,

HENRY B. CARRINGTON.

(Senate Ex. Doc. 13, first session, Fortieth Congress.)

FORT PHIL. KEARNY, *December 21, 1866.*

Do send me reenforcements forthwith. Expedition now with my force is impossible; I risk everything but the post and its stores; I venture as much as anyone can, but I have had to-day a fight unexampled in Indian warfare; my loss is ninety-four killed.

I have recovered 49 bodies and 35 more are to be brought in in the morning that have been found. Among the killed are Brevet Lieut. Col. Fetterman, Capt. F. H. Brown, and Lieut. Grammond. The Indians engaged were nearly 3,000, being apparently the force reported as on the Tongue River in my dispatches of 5th November and subsequent thereto. This line, so important, can and must be held; it will take four times the force in the spring to reopen it if it be broken up this winter. I hear nothing of my arms that left Leavenworth September 15. The additional cavalry ordered to join me has not reported; their arrival would have saved us much loss to-day.

The Indians lost beyond all precedent. I need prompt reenforcements and repeating arms. I am

sure to have, as before reported, an active winter and must have men and arms. Every officer of this battalion should join it. To-day I have had every teamster on duty and but 119 men left at post. I hardly need urge this matter; it speaks for itself. Give me 2 companies of cavalry, at least, forthwith, well armed, or 4 companies of infantry, exclusive of what is needed at Reno and Fort Smith.

I did not overestimate my early application of a single company. Promptness will save the line; but 100 killed shows that any remissness will result in mutilation and butchery beyond precedent. No such mutilation as that to-day is on record. Depend upon it that the post will be held so long as a round or man is left. Promptness is the vital thing. Give me officers and men only; the new Spencer arms should be sent; the Indians are desperate; I spare none and they spare none.

HENRY B. CARRINGTON,
Colonel Eighteenth Infantry.

Brevet Maj. Gen. P. ST. GEORGE COOKE.
(*Id.*, p. 26.)

FORT LARAMIE, *December 27, 1866.*

Orders to command at Fort Reno issued yesterday; the most violent, blinding storm now raging; there would be nothing gained by moving in such a snowstorm; meantime all preparations which can be made indoors are going on. One Indian messenger, just in to see the Indian agent, gives the following information: He says there is a grand coalition of Indian tribes north, to the number of 10,000 to 12,000 fighting men; they are to make common cause against the whites; twelve tribes are enumerated; story somewhat improbable, because tribes

deadly hostile to each other are named, and such large numbers can't live together; not enough for them to eat in the country.

J. N. PALMER, *Commanding.*

Maj. H. G. LITCHFIELD,
Assistant Adjutant-General.

(*Id.*, p. 29.)

ST. LOUIS, *December 28, 1866.*

GENERAL: Just arrived in time to attend the funeral of my adjutant-general, Sawyer. I have given general instructions to Gen. Cooke about the Sioux. I do not yet understand how the massacre of Col. Fetterman's party could have been so complete. We must act with vindictive earnestness against the Sioux, even to their extermination—men, women, and children. Nothing less will reach the root of this case.

W. T. SHERMAN,
Lieutenant-General.

U. S. GRANT.

(*Id.*, p. 27.)

ST. LOUIS, *December 29, 1866.*

GENERAL: Your dispatch of yesterday is received. I have another dispatch from Gen. Cooke, but nothing more definite as to the Fort Phil. Kearny massacre. A heavy snowstorm is prevailing west of Omaha, and cuts off communication. I will have the matter fully investigated. In the meantime the Indians must be pursued and punished. Gen. Cooke asks for a regiment of cavalry and one of infantry. I will see if the two new colored regiments, now organizing in Gen. Hancock's department, can be made available by April 1; if not, I may have to

ask some help from Gen. Grant. Please ascertain of him if he has any troops he could spare this spring, as we must not overlook this case, but must pursue and punish at all hazards. The posts in that quarter are strong and well supplied; but it is reported that the Sioux have 3,000 warriors, well armed, and their country is very difficult to operate in.

W. T. SHERMAN,
Lieutenant-General.

Gen. C. B. COMSTOCK, *Aide-de-Camp.*

(*Id.*, p. 28.)

December 27, Gen. P. St. George Cooke writes the chief of staff at Washington:

My special orders to meet this case have been mailed to you (as in usual course). The six companies ordered forward will have the duties of reenforcing, perhaps, Fort Reno, opening communication with C. F. Smith; reenforcing that, besides Fort Philip Kearny. Deficiency of troops, the season, and the amount of supplies at the upper posts, together do not admit of more being sent. I hope they will do and be able to carry out my telegraphic instructions to Gen. Wessells, viz: "I expect you to make Fort Reno safe, with power to forward mails, and to proceed with all other of the six companies ordered to you above. I hope regular communication can be kept with Fort C. F. Smith, and that we may be able to chastise Indians who may insult the posts; but with great caution. The officers are not equal to their stratagems in the broken ground they know so well. Their numbers, it seems now certain, are also very superior." (*Id.*, p. 29.)

The following private letter shows that at the close of January the hostilities are still as bitter and continuous. (Senate Ex. Doc. 13, Fortieth Congress, first session, p. 36):

> It is now past tattoo; the night is cold; the men are sleeping in their clothes and accouterments on. Indian signals have been seen, and we don't know what hour the post may be attacked. Self and two soldiers are keeping watch, so as to awake the men in case of alarm. At midnight I shall have Sergt. Clark and three others to relieve us. So you can imagine the state of affairs here.
>
> I have seen an article in a Chicago paper stating that the Commissioner of Indian Affairs had received intelligence that reports of hostilities on the frontier were without foundation and were exaggerated. The Indian commissioners are furnishing Indians with arms and ammunition to hunt with, and they are using them to murder white men. Those commissioners are a nuisance to the Government. We want men and arms on these plains to exterminate this accursed race of savages. We are fighting a foe that is the devil. In your last you spoke about some newspapers which you had sent me; I did not get them. Please write soon, and pray God to hasten the day when I shall get out of this horrible place.
>
> Good bye; this may be my last letter; should it reach you, don't forget your friend. (*Id.*, p. 36.)

The following from the report of General Sherman dated July 1, 1867, shows that hostilities were extensive and continued daily up to this date. (Report of Secretary of War, 1867–68.)

> But the Sioux have not confined their efforts to resist the opening of that single road. They have

carried war down several hundred miles south, and have killed our people and have stolen our horses at Brady's Island, at Ash Hollow, or Lodge Pole, and even to the south of the South Platte. Some of the same Sioux are at this moment at *open war*, in combination with *Cheyennes* and Kiowas, as low down as the Smoky Hill, where I believe they never before claimed the right to go. Hostilities have prevailed from Minnesota to Texas.

Bvt. Maj. Gen. Augur, commanding Department of the Platte, makes his official report, in which he says (Report of Secretary of War, 1867–68, p. 58):

As early as February the Indians commenced a system of attacks upon small parties and trains along the Montana (Bozeman) route, and as the season advanced extended them to all my lines, and have kept it up during the whole summer. This has constituted the Indian war in this department. It is more in the nature of disconnected raids for stealing animals and getting other plunder than of a systematic and permanent war. The raiding parties have been small and scattered along the various lines of communication in the department. * * *

The Montana (Bozeman) route alone between Laramie and C. F. Smith, near the Yellowstone, has occupied two regiments of infantry, * * * half a regiment of cavalry, * * * and they have merely maintained themselves upon it and kept it open for their own supplies. The troops at the posts upon it have to fight almost daily to secure their supplies of wood and hay. It has been unsafe as an emigrant road, though much required, and has not been used at all for that purpose.

That all the Sioux Indians occupying the country about Fort Phil Kearny have been in a state of

war against the whites since the 20th day of June, 1886. (Report of Gen. Sanborn, July 8, 1867; Senate Ex. Doc. 13, Fortieth Congress, first session, p. 62.)

* * * The commissioner, General Buford, traces the cause of the outbreak this spring to Major-General Hancock's expedition to Fort Larned and to his burning the Indian camp on Pawnee Fork in April last. In this I am sure he is in error, for long before General Hancock had started we had unmistakable signs of trouble and positive threats of warriors well known to us that as soon as the *grass grew* there would be a combined attack on all our roads by the Sioux of the north, and the Cheyennes, Arapahoes, and Kiowas of the south. * * * We have not pushed our possessions this year at all, and have invaded no new Indian lands or hunting grounds, and yet they took the initiative, and Indian hostilities have prevailed from Minnesota to Texas. (Report of Lieut. Gen. Sherman, July 1, 1867; Report Secretary of War, 1867–68, pp. 65, 66.)

A large majority of the Indians of the Upper Platte Agency, consisting of the Ogallala and Brulé Sioux, Cheyennes and Arapahoes, who are known as Prairie or Blanket Indians, have been engaged for nearly *two years* past in a most determined and relentless war against the whites. From information gathered from the reports of those specially commissioned and authorized by the President to visit the Indian country for the purpose of ascertaining the cause of this most bloody and formidable war, I am warranted in saying that it had its origin in the intense dissatisfaction created among the Indians by the endeavor of the Government, without their consent, to open a new route leading from Fort Laramie

> northward to the gold districts of Montana and Idaho, and the location of military posts along the proposed route, to protect travel and immigration. This route passes through what is termed the Powder River country, and is regarded by the Sioux Indians who live north of the Platte River as their best hunting ground. * * * Nearly all the Indians of this agency (the Upper Platte Agency, embracing Ogallala and Brulé Sioux) have been engaged in active hostility against the Government for the last two years. (Report of H. B. Denman, supt. Indian affairs, northern superintendency, to Hon. Chas. E. Mix, Acting Commissioner of Indian Affairs, Nov. 1, 1867; Mess. and Docs. 1867–68, Int. Dept., pt. 2, pp. 260–269.)

In his report he says that—

> Brule and Ogallala Sioux, Cheyennes, and Arapahoes are tribes belonging to the Upper Platte Agency, and more or less, with the exception of a few friendly disposed, have been engaged in hostilities against the Government for *more than a year past*. (Report of Chas. E. Mix, Acting Commissioner of Indian Affairs, to Secretary of Interior, Nov. 15, 1867.)

After referring to the attacks made by the Indians at Fort Phil Kearny, on Powder River, December 21, 1866, upon a wagon train and its escorts, in which Brevet Lieutenant-Colonel Fetterman and a number of his men were killed, General Grant says:

> In the *spring of 1867* rumors were received from all quarters of a renewal of Indian hostilities. Though many proved to be greatly exaggerated, yet depredations and attacks on the principal emigrant routes increased to such an extent that it

required the utmost activity on the part of the troops to keep open communication with our Territories and protect working parties on the important railroads now in process of construction. (Report of Gen. U. S. Grant, Sec. of War ad interim, to the President, Nov., 1867; Report of Sec. War, 2d sess., 40th Cong., 1867–68, p. 28.)

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The statement, on page 5 of appellant's brief, that prior to the acts of 1859 and 1870 it had been the practice to pay such claims as they arose and were established *is denied*. The following are the appellees' propositions:

(1) There is no *presumption* that payments were made for claims of any kind of a character sufficient to indicate a policy because of the acts of 1796, 1799, 1802, and 1834. Those very acts were urged upon Congress upon the introduction of every bill for the payment of depredation claims as a reason why the claims should be paid, with the accompanying statement that the Government ought to redeem its promise of eventual indemnification, and the statement usually accompanied the appeal to these acts that Congress had neglected its duty in that behalf. The

reason for the passage of the act of 1870, forbidding future payments without special appropriation, grew out of the universal suspicion under which depredation claims had fallen and the desire of Congress to prevent the possible payment of claims without its special attention and approval.

Even if there be a presumption from the early acts of Congress mentioned that some payments were made, nevertheless such presumption can not be applied to war claims. The authorities cited by claimant's counsel from the report of the Commissioner of Indian Affairs of October 22, 1866, expressly declare:

> The theory of existing law is that where a tribe is in *amity* with the Government and any of its individuals commit depredations the tribe can have the opportunity of compelling its delinquent member to make restitution, or, upon the facts of the outrage being made apparent, of *consenting* to restitution from the common means of the tribe. But where peaceable relations are interrupted, from whatever cause, with a whole tribe, as was the case with the Arapahoes and Cheyennes in 1864, it is impracticable to present the claim to them for allowance, and they can not be properly said to be in "amity with the United States," being in fact *at war* with the Government. (Rep., Com. Ind. Aff., 1866, p. 19.)

(2) The letter of the Secretary of War of March 13, 1816 (Amer. State Papers Ind. Aff., vol. 2, p. 27), does not clearly state the existence of a practice of paying even peace claims. The Secretary's letter refers to "losses of property by American citizens from the robberies, thefts,

and depredations of those tribes" which "are *to be* remunerated out of the annuities." It is more proper to say that in defining his duties by this letter the Secretary was stating the work of the present and the future of *examining the evidence* in such cases. Nothing is said about past or present payments, but something is said about remuneration *to be thereafter made*. The letter does not prove a practice of paying, but only a duty of investigation, and that investigation confined to trespasses only applicable to a state of peace.

(3) The letter of Governor Gorman, *ex officio* superintendent of Indian Affairs, cited by counsel, *proves* that no payments were made or allowed to be made up to 1854. It does not prove any practice of payments even for peace claims after that time, but only establishes "that payments can be enforced." (Rep. Sec. of the Int., 1854, p. 255.)

(4) The letter of the Commissioner of Indian Affairs of March 3, 1886, to Senator Dolph (House Report 3117, Forty-ninth Congress, first session, p. 28) does contain a statement that prior to 1870 claims against Indians for depredations were paid by Indian agents; but the letter expressly states "*as to what amount was thus paid the office* [Indian] *has not been able to ascertain.*" The letter is of no value as against the official statement of Secretary of the Interior Noble in 1892, wherein he discloses the precise amounts of the payments, which, as stated by me, are not sufficient to establish a policy of paying claims arising even in time of peace out of annuities.

The statement on page 3 of the Hailey report (H. R. 3117) seems to have been based entirely upon the letter

of the Commissioner of Indian Affairs, and is not sustained by references to any letters, documents, reports, statutes, or other official data except the letter to Mr. Dolph. (Appendix I.)

So much for the statement that it was the practice of the Indian agents to pay claims. At most, and whatever payments were made, such a practice related exclusively to claims arising in a time of peace where the tribe declined to deliver up the offenders and where notice was given to them, and in short, where the procedure imposed by the acts of 1802 and 1834 was strictly followed. This must be the necessary presumption.

For the appropriations made by Congress in special acts for the payment of claims, the Commissioner stated in 1886 that these appropriations were "about the sum of $1,654,530." But these special acts of Congress from 1819 to 1885, to which the Commissioner (Atkins) referred, include appropriations for claims of persons *out of the public Treasury* as well as from funds of the Indians, where such persons suffered damage from certain tribes as well as from "the troops of the United States" in Minnesota. (12 Stat. L., 652.) The title to that act (February 16, 1863, 12 Stat. L., 652) is misleading in the statement that it is "an act for the relief of persons for damages sustained by reason of depredations and injuries by certain bands of Sioux Indians," because the second section of the act expressly provides for the payment out of the Indian annuities and from the Treasury of the United States to the heads of families and the surviving members of families of the State of Minnesota who suf-

fered damage by the depredations of the tribes named, "*or by the troops of the United States* in the late Indian war *in the State of Minnesota*, not exceeding the sum of two hundred dollars to any one family."

This was one act of Congress where, on account of the peculiar atrocity of the Indian warfare upon families whose heads were serving in the South in the civil war Congress saw fit to confiscate annuities outright, which was an act of national sovereignty at the time of the suppression of the Indian war. This act was followed by an appropriation from the Treasury of $928,411 for the payment of the several amounts awarded by the commission appointed under the first-named act. *This* sum of money did not come from the Indian annuities at all. (13 Stat. L., 92, 93.) Thus, of the sum amounting to more than $1,000,000 appropriated by these two acts, a small percentage came from confiscated annuities on the abrogation by the United States of its treaty with certain bands of the Sioux. These two acts were followed by a small appropriation for the relief of Siloma Deck (18 Stat. L., pt. 3, 543) and a small appropriation for the relief of one Peterson. (19 Stat. L., 549.)

These appropriations were instances of generosity, and not the recognition of rights under the system of Indian-depredation laws; just as though Congress had appropriated money for the assistance of farmers whose crops were destroyed by grasshoppers or whose cornfields perished in drought.

The small number of instances of appropriations on account of injuries done by Indians in other cases do not

merely relate to depredations upon property, but embrace the account of personal injuries as well, as, for instance, where appropriations were made to the women sufferers of the Meeker massacre, to Amanda M. Fletcher, and to Manuelita Swope and others.

House Report 3117, Forty-ninth Congress, first session, referred to on page 3 of the supplemental brief for claimant in reply, has not been verified by the claimant in the statement that Congress has appropriated by special acts in payment of claims about the sum named in that report. If the court will look to the letter of the Commissioner of Indian Affairs on this subject it will see that the Commissioner himself refers to no specific acts to sustain his report. The quotation from the same report (House Report 3117, p. 3, claimant's supplemental brief in reply,) and the reference on p. 4 to House Report 1079 are merely the general expressions relating to the subject of payments without any proof to sustain them. The statements can nowhere be verified and their repetition only shows that the authors of those reports accepted the statement without adequate sources of information.

We have, however, an official statement showing the disposition of depredation claims up to June 30, 1891, in full and specific form in Senate Ex. Doc. No. 117, in the first session of the Fifty-second Congress, being a letter from the Secretary of the Interior, dated June 24, 1892. This statement shows three items, which explain themselves, and which must be accepted as authoritative and accurate, because they emanate from the head of the

Department whose business it was to give Congress accurate information on the subject of depredation claims. I quote from the report as follows:

Paid or *otherwise adjudicated* by the Secretary of the Interior prior to the act of May 29, 1872	$216,380.83
Paid under authority of various acts of Congress prior to March 3, 1885	208,140.10
Paid under authority of acts of Congress since March 3, 1885	10,050.00

(Official statement of Secretary Noble, referred to the Select Committee on Indian Depredations. Senate Ex. Doc. No. 117, first session Fifty-second Congress. Herewith filed.)

Respecting payments under the acts of 1872 and 1885, the findings of fact in the court below show that Congress has refused to pay depredation claims where the tribe charged was at war with the United States on the ground that such losses were incident to a state of war with a savage tribe. (Finding VII, Leighton transcript. Finding XIV, Marks transcript.)

WAR CLAIMS EXCLUDED BECAUSE—

(1) The statute provides the defense of a want of amity. Wherefore the use of the words "in amity" if the Indians were considered not capable of a contrary condition? The words imply the recognition of the rights of belligerents.

(2) Provocations given by the claimants afford a defense.

(3) The fourth section of the act of 1891 authorizes *any defense whatsoever*, and this applies to all classes of claims.

(4) Acts of claimants in plundering Indians of *their* property and killing Indians out of amity constitute the kind of provocation which the statute authorizes the tribes to plead in defense. The courts of the United States are not open to the citizens of one party to the controversy against the parties to the other side of the controversy with a legislative adjudication imposed by law that the tribes were solely responsible for the want of amity.

(5) Actual hostilities put an end to mere *agreements* to keep peace. (*Society, etc.*, v. *New Haven*, 8 Wheat., 491; Vattel lib. 4, ch. 1, § 8, and authorities cited Marks's brief, p. 58, for appellees.)

Acts of plunder during hostilities are lawful acts, just as murders in warfare are justifiable and beyond punishment as crimes.

(6) The act of 1891 does not reasonably admit of such a construction that it can safely be said Congress intended to charge the annuities of the children of the depredators for acts of war of a former generation. The present generation of Indians are drawing annuities under treaties which superseded the old treaties and which carried an amnesty to the original offenders at the time of the execution of the subsequent treaties.

(7) Nor is it reasonable to suppose that Congress intended to provide for the adjudication of claims arising in a state of war, because of the utter impracticability of such a thing and the abuses to which such a law might lead. (Vattel's Law of Nations, 402.)

(8) Nor would Congress reverse the general policy of the Government in assuming the payment of war claims

in the face of repeated reports of Congressional committees from the Revolution to 1891, the opinions of statesmen from Hamilton to Vice-President Wilson, and the decisions of the courts, as far as they have gone on this question. (Report of Committee on alien claims, second session, Forty-third Congress; 13 How., p. 115; Marks's brief and authorities there cited, p. 92.)

(9) Nor can the intention to satisfy claims arising in the excitement and confusion of public hostilities be gathered from the preceding history of the laws relating to Indian depredations. These laws are comprised under several statutes, passed at different periods, varying and modifying the system occasionally, as policy required; but all being *in pari materia* are to be looked to as one statute in explaining their meaning and import, just as this court declared with reference to the land laws of Georgia (*Patterson* v. *Winn*, 11 Wheat., 386); and, just as this court has declared in doubtful cases, courts should compare all the parts of a statute and different statutes *in pari materia* to ascertain the intent. (*United States* v. *Freeman*, 3 How., U. S., 553.) It is not doubted that all the laws relating to depredations of Indians were applicable to claims arising when the tribes were at peace, and the same construction should be given to the act of 1891.

HOSTILITY OF THE OGALLALAS OFFICIALLY RECOGNIZED.

The treaty proclaimed February 24, 1869, between the United States and the different tribes of Sioux (15 Stat. L., 635) included the Ogallala Band. This treaty was an official recognition that war existed between the Ogallalas

and the United States up to that date, because the treaty expressly declares "from *this day* forward all war between the parties to this agreement shall forever cease." This treaty is as much an official recognition of an existing war as the acts of Congress relating to the hostilities of the Bannocks and other tribes of Indians. (22 Stat. L., 111; 24 Stat. L., 217; 25 Stat. L., 575, 938; 26 Stat. L., 13.)

WANT OF NOTICE.

In proceedings *in rem* jurisdiction acquired by seizure of the property must, in order to be effectual, be followed by notice in some form to the party whose rights are to be cut off or affected by a decree against the property. Such notice, either personal or constructive, is as necessary * * * as a personal notice is in case of an action against the persons. (Work on Courts, p. 45, and cases cited.)

Note conflict of interests possible here, as where the Indians might defend on the lack of proof of identity, while it is the Government's interest to identify the tribe if judgment is likely to be recovered in any event, for then the judgment would be paid from tribal funds. In case of such a conflict of interest between guardian and ward, would service on guardian be deemed sufficient? I do not think it would, and the act can not be upheld on the idea that the United States have provided a guardian *ad litem* in the person of the Attorney-General of the United States for the defendant tribe.

CHARLES B. HOWRY,
Assistant Attorney-General.

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IN THE

Supreme Court of the United States.

October Term, 1895.

ALVIN C. LEIGHTON, appellant,
v.
THE UNITED STATES, *et al.* } No. 413.

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR APPELLANT IN REPLY.

Constitutional Objections.

The appellees' brief raises the objection that this act seeks unconstitutionally to deprive the Indian defendants of their property without due process of law. Two grounds are stated for this:

I. That no process or notice has been served upon the Indians (appellees' brief, pp. 113–124).

II. That the rights of the claimant against the Indians were terminated by the expiration of the limitation in the act of 1834 (appellant's brief, p. 72), and can not be revived by a repeal of the limitation (appellees' brief, pp. 68–79).

These objections affect only the judgment against the Indians. The constitutionality of the act and of the proceedings under it as against the United States is not questioned.

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The first of these objections was made in the Court of Claims, and overruled in the case of Jaeger *v.* United States (27 C. Cls., 282). The opinion in that case is an elaborate discussion of the subject.

The act of March 3, 1891, sec. 4 (appellant's brief, p. 79), contains the following provision:

"The service of the petition shall be made upon the Attorney-General of the United States in such manner as may be provided by the rules or orders of said court. It shall be the duty of the Attorney-General of the United States to appear and defend the interests of the government and of the Indians in the suit. * * *"

Then follow provisions that the defendant's pleading shall be filed within sixty days; that, if not so filed, the court shall proceed as it deems proper; that no judgment for the claimants shall be rendered without proof and that the Indians may, with the approval of the Commissioner of Indian Affairs, employ special attorneys. The Court of Claims made a rule that if the defendant's pleading was not filed within sixty days, a general traverse of the petition should be entered for the defendants by the clerk.

There can be no doubt that Congress intended to bring the Indians and the United States alike into court by service of process upon the Attorney-General. The appellants contend that Congress acting both as guardian and as sovereign, has a right to determine how service of process upon the Indians as wards of the nation may be made.

The executive officers of the United States exercise the active duties of guardianship. The Secretary of the Interior has charge of their persons and the Secretary of the Treasury of their funds. Congress may confer the guardianship of any particular interests of the Indians

upon any suitable executive officer. The Attorney-General is, by this act, given charge of their interests in these judicial proceedings; he is a kind of guardian *ad litem*.

While service of process is necessary to bring any party into court, yet no one can doubt that service upon a guardian, if the legislative power so provides, is sufficient to charge the ward. The earlier rule of service on the infant has been changed in most States by requiring service on some adult member of the infant's family (Work on Courts and their Jurisdiction, 264).

It is to be considered also that judgments rendered in these cases against the Indian tribes are not judgments *in personam* upon which general execution is to be levied from the property of the defendants. They are judgments to be collected, if at all, from funds in the hands of the United States (act of March 3, 1891, sec. 6, appellant's brief, pp. 80, 81). All courts render judgments against assets within their jurisdiction belonging to absent defendants, by service upon the property itself or its holder. Congress has designated the particular officer of the United States upon whom process is to be served to charge the funds of the Indian defendants held by the United States.

For this reason, no question of constitutional power could be raised, even if the defendant Indians did not hold their peculiar relation to the United States.

The second question presents no great difficulty. The appellees' brief cites a large number of judicial decisions, holding that the repeal of an existing bar of the statute of limitations takes away property rights. This court has, however, in the case of Campbell *v.* Holt (115 U. S., 620) held directly to the contrary, in actions for the recovery of a money judgment. This would seem to be a final answer to the appellees' contention.

But there are other grounds on which the right of Con-

gress to deal with the funds of the Indians in the manner provided by this act can be sustained.

(1) The United States has complete control over all subordinate organizations for governmental purposes within its exclusive jurisdiction. It can deal with the territorial governments and that of the District of Columbia as it pleases. The Indian governments and all their property are subject to the direction and will of Congress. Were it not so, these would be practically independent powers. The relation between the United States and the Indians, this court has said, "authorizes the adoption on the part of the United States of such policy as their own public interests may dictate" (Choctaw Nation *v.* United States, 119 U. S., 28).

(2) If this doctrine should be limited, by holding that the power of the United States over the property of the Indians, as its wards, is not absolute but is limited to the protection of the property and its distribution for their welfare, some discretion must still be admitted in Congress. It is not doubted that Congress may devote the Indian funds to paying legal claims against the Indians. The recognition of their moral obligations, resting on principles of fair dealing though not on strict legal principles, must be equally within the discretion of Congress. The payment for their depredations on the property of white men, is at least an obligation of this class.

(3) A judgment against the Indians under this act is wholly unlike an ordinary judgment. Its effect is to declare the identity of the Indians and to fix their liability to pay out of funds which may properly be subject to diminution on that account.

In lieu of execution, this act provides (sec 6, appellant's brief, pp. 80, 81) as follows (paragraphed for convenience):

"That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner:

"First, from annuities due said tribe from the United States.

"Second, if no annuities are due or available, then from any other fund due said tribe from the United States, arising from the sale of their land or otherwise.

"Third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriation for their current and necessary support, subsistence and education.

"And fourth, if no such annuity, funds, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States.

"*Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe."

If the paragraph beginning "First" stood alone, then it might be said that Congress intended to take annuities or trust funds of the tribe contrary to their original purpose. But paragraph "Second" is introduced by words "if no annuities are due or available," thus providing that even if annuities are due, payment is not to be made from them unless also available. The word "available" here must be read an equivalent to "constitutionally available."

The same language is repeated in regard to the second class of funds; the third class, appropriations for the benefit of the tribe, are under the control of Congress.

The final proviso that the amounts paid shall be deducted from future tribal funds, is strictly within the

power of Congress, although its only force is a recommendation to future Congresses.

This construction of the act has received a practical approval by Congress in the act of July 28, 1892, and subsequent appropriation acts (appellant's brief, p. 83) by which the deductions from tribal funds are to be made with due regard to the needs of the tribes and the reimbursements are to be made as may be for the interests of the Indian service. The Secretary of the Interior has reported to Congress (Sen. Ex. Doc. 92, 52d Cong., 2d Sess.) that in paying out the sum of $478,252.62 appropriated by this act, only $1,175 has been paid from Indian funds.

The judgment against the Indians having as its result only the ascertainment of the tribe and payment out of properly available funds, intrenches on no property right of the Indians.

Classes of Claims.

On page 45 of the appellees' brief, an effort is made to reconcile the presence in section 1 of the act of March 3, 1891, of words defining separate classes of claims with the theory that only claims in amity are provided for. This language is used:

> "The truth is, the conference committee undertook to guard against the possible exclusion by implication of all claims which had already been considered."

This is also the view taken by the Court of Claims (Leighton *v.* United States, 29 C. Cls., 318).

Had the paragraph beginning "First" in section 1 been unaccompanied by paragraph "Second," it is not possible that any court could have held the jurisdiction limited to cases never acted on by the Interior Department. The terms are general; they are unlimited in that respect.

Paragraph "Second," even under those circumstances, would have been unnecessary.

The remainder of the act makes it almost a mathematical certainty that Congress did not insert these words to prevent such an inference. Numerous references to pending claims are made throughout the act. In section 2 it is provided that no claim shall be excluded from jurisdiction because not heretofore presented and that no claim accruing before July 1, 1865, shall be considered unless pending with evidence in its support; in section 4 that testimony, affidavits and other papers on file in the Department shall be considered as evidence in the court, that allowed claims under the act of 1885 shall have priority of consideration, or if reopened, that the testimony in the Department may be read as proof; in section 11, that all papers on file in the Department relative to any claim under this act shall be furnished to the court; and in section 13 the transfer of the claims in the Interior Department to the court is provided for. All these show that throughout the whole act, there was abundant provision to prevent any idea that pending claims were excluded. This theory of the purpose of paragraph "Second" illustrates the great embarrassment arising from forcing it out of the only natural construction that it provided a separate class of cases outside of amity for the consideration of the court.

Departmental Construction.

In the appellees' brief reference is made (pp. 103, 106, 108) to an opinion of the Interior Department in the case of Myron J. Holmes, reported in the case of McLendon, No. 7378, in the Court of Claims. A copy of this is not attached to appellees' brief but for complete under

standing of these references, it is here added as Appendix H.

Ratification by Re-enactment.

The following authorities are now cited in addition to those cited on pp. 37 and 38 of appellant's brief in support of his contention that the re-enactment of the act of March 3, 1885, by the act of March 3, 1891, confirmed the existing construction of the act of March 3, 1885, known to Congress when the later act was passed:

"Where the terms of a statute, which has received judicial construction, are used in a later statute, whether passed by the legislature of the same State or country or by that of another, that construction is to be given to the later statute. It is presumed that the legislature which passed the later statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law." Potter's Dwarris on Statutes and Constitutions, 274, *note.*

"This judicial construction, it is presumed, was known to the legislature, when they adopted the code containing the same statute substantially; and it is further presumed they intended to adopt this construction." O'Byrnes *v.* State, 51 Ala., 25.

"We must take it for granted that, at the time the Involuntary Act of 1876 was passed, the legislature knew the construction which had been placed on the act of 1852. With this knowledge it passed the Involuntary Act, containing as already said, substantially the same provision, so far as this question is concerned, as is found in the original act. This was a legislative adoption of the known construction of that provision." *In re* Baker, 55 Cal., 303.

"The legislature, with this construction given to the act by repeated decisions of this court before it, has carefully avoided, in the amendments it has made to the act, any material change that could relieve it from the force

of these rulings. We must regard the legislation upon this act, as fully adopting the construction placed upon it, and whatever views we may entertain as to the proper interpretation of the language of the statute, still, after such repeated and uniform construction has been given to it, and the makers of the law have so plainly acquiesced in this construction, we do not feel at liberty to discuss its correctness." Railroad Co. *v.* Guard, 24 Ind., 222.

"The legislature, by thus substantially re-enacting, without material alteration, a statute which had been judicially expounded by this court, must be presumed to have intended that the same words should receive the same exposition and have the same meaning in the new statute as in the old." Low *v.* Blanchard, 116 Mass., 272.

"This was the construction put upon the act of 1791, which act has, as we have seen, been twice re-enacted since, without any change in the language that would indicate any intention to change the law; and it is an established legal maxim that when the legislature adopt or re-enact a statute the previous construction of the statute as settled by the courts of law is adopted." Frink *v.* Pond, 46 N. H., 125.

"When a law, antecedently to a revision of the statutes has been settled by judicial construction, such construction should be given to the regulation on the same subject in the revision, unless there is a manifest intention of the legislature that a different one should prevail." Yates' Case, 4 Johns. (N. Y.), 359, *per* Chancellor Kent.

"When a statute has been for a time in force, and certain terms used in it are of ambiguous import, to which a fixed and settled construction has been given, it is rational to conclude that a legislature acquainted with the interpretation they had received when they employed the same terms, intended to adopt their received interpretation. This is a rule of construction resorted to for the purpose of ascertaining the intention and meaning of the legislature." Gray *v.* Askew, 3 Ohio, 466.

"The provisions of the constitution conferring probate

jurisdiction upon the county courts being, in reference to the matters now under consideration, no broader than were they under the former law, and almost identical in language, a consideration of cases adjudicated under the former law will show the construction put upon that law by this court, and such construction the makers of the constitution are presumed to have had in view at the time of its adoption." Timmins *v.* Bonner, 58 Texas, 554.

"When our statute of wills was enacted the Statute of Charles II had received a long, fixed and well-known construction, and when we adopt an English statute we take with it the construction which it had received—and this upon the ground that such was the implied intention of the legislature." Adams *v.* Field, 21 Vt., 256.

"Another rule of construction is, that where a known statute has been re-enacted in terms, its interpretation will be presumed to have been also adopted by the legislature." Harrington *v.* Smith, 28 Wis., 67.

This court appears never to have had this point directly before it. In the opinions in the case of Swift Company *v.* United States, 105 U. S., 691; 111 U. S., 22, relied on by the Court of Claims (29 C. Cls., 323), this question is not discussed and, from the reports of the case, is not shown to have been argued. The inapplicability of this case to the question at bar is discussed in appellant's brief, pp. 39, 40. The reason of the rule of ratification by re-enactment, it is there pointed out, is in the knowledge of Congress of the former construction. That Congress would not have had knowledge of the construction made by the Department in the case of the Swift Company is shown by the fact that the section construed was in each enactment but an unimportant part of a very extensive statute. It was section 102 of the act of July 1, 1862 (12 Stat. L., 477); the act of March 3, 1863 (12 Stat. L., 714), is a long act, making numerous amend-

ments, among these one to this section; it was section 161 of the act of June 30, 1864 (13 Stat. L., 294); it was section 4 of the act of July 14, 1874 (16 Stat. L., 257), a general revenue act of thirty-eight sections.

This court has spoken as follows in two cases, approximating the pending question:

"It is not to be supposed that Congress, in using in the act of 1875 the same language, so far as the present question is concerned, as that employed in the act of 1789, intended to give it a meaning different from that put upon it by this court, and which had remained unchallenged for three quarters of a century." United States *v.* Mooney, 116 U. S., 106.

"This court having thus interpreted the act of July 1, 1862, we can not, consistently with the established rules of construction, give a different meaning to substantially the same words in the act of May 7, 1878." U. S. *v.* Cent. Pac. R. R. Co., 118 U. S., 235, 240.

The "established rules of construction" referred to in this opinion would seem to be those laid down in the foregoing citations.

CHARLES KING,
WILLIAM B. KING,
Attorneys for Claimant.

APPENDIX H.

Opinion of Commissioner of Indian Affairs in case of Myron J. Holmes, filed in the Court of Claims in the case of McLendon v. *United States, No. 7378.*

"DEPARTMENT OF THE INTERIOR,
"Office of Indian Affairs,
"WASHINGTON, *May 24th, 1893.*

"THE HONORABLE THE SECRETARY OF THE INTERIOR.

"SIR: I have the honor to acknowledge receipt of your reference dated May 2, 1893, of the communication of the Court of Claims, bearing date April 29, 1893, inclosing three motions, among which is one signed by Messrs. Charles and Wm. B. King, attorneys for claimant, requesting the Secretary of the Interior to furnish to the Court of Claims, that the same may be used on the trial of the cause entitled 'Dennis McLendon *v.* The United States, No. 7378, Indian depredation,' now pending in said court, any information or papers (or duly authenticated copies of the same if preferred) supposed to be on file in the Interior Department, as set forth in the accompanying rule allowed by Chief Justice Richardson, as follows:

"'Whether in the adjudication of Indian depredation claims under the act of March 3, 1885, and subsequent acts, claims were disallowed because a state of hostility or war existed.

"'Whether in the adjudication of such claims under said acts, and a treaty appeared similar to the treaty with the Bannock Indians of July 3, 1868 (15 Stats., 673), claims were disallowed or consideration thereof refused because of a want of a sufficient treaty provision to render the Indians liable therefor.'

"In reply I have the honor to report, with the return of said communication and its inclosure, that the 1,459 claims arising from Indian depredations investigated and presented to Congress by the Interior Department, pursuant to the act of March 3, 1885 (23 Stats., 376), up to the date of the approval of the act of March 3, 1891 (26 Stats., 851), which required 'that the investigation and

examinations * * * of Indian depredation claims shall cease,' were those chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States; and it does not appear that any of said claims were recommended for disallowance because the tribe of Indians charged was, at the time of the alleged depredation, in a state of hostility or war.

"'In determining what claims were subject to investigation under the act of March 3, 1885, as amended by the act of May 15, 1886 (24 Stats., 44), the opinion of the Assistant Attorney-General for the Interior Department was obtained, under date of August 23, 1886, which decides that all claims in favor of citizens of the United States (*i. e.*, those who were citizens at the date of the alleged depredation) for losses by Indians who were in treaty relations at the time of the loss, which were on file March 3, 1885, are subject to investigation' (Report of Commissioner of Indian Affairs for 1889, page 43). The question as to the liability attaching to Indians on account of depredations committed by them upon the property of citizens of the United States, except as provided by treaty stipulations, did not thus become vital to the determination of what claims were to be investigated under said acts, and therefore was not considered by the Department in connection therewith (see opinion of Assistant Attorney-General above cited).

"The sufficiency of treaty stipulation to render the Indians liable, appears to have been discussed at some length in the report made upon the claim of Myron J. Holmes, No. 731. This claim grew out of depredations alleged to have been committed by the Ogalalla Sioux Indians, July 7, 1867, and was filed in this Office September 25, 1869. On November 20, 1886, the Office submitted the following conclusions thereon, which were concurred in by the Department, November 23, 1886, and the claim transmitted to Congress, January 5, 1887 (see Ex. Doc. H. R., No. 77, 49th Cong., 2d Sess.):

"'* * * At the time of the commission of the alleged depredation, there was subsisting a treaty between the said tribe of Indians (Ogalalla Sioux) and the United States, which was proclaimed by the President of the

United States on March 17, 1866. By the terms of said treaty, the said tribe duly declared and promised a perpetual peace with the United States, and to its citizens, and acknowledged that the said tribe "individually and collectively, were to be subject to the exclusive jurisdiction and authority of the United States."

"'Said treaty further provided that the Government of the United States would pay an annuity to said tribe of $25 for every lodge or family, who shall engage in agricultural pursuits, whenever twenty families or lodges shall signify such intent, and in addition thereto, to furnish a farmer, blacksmith and teacher, whenever the number of families or lodges engaged in agricultural pursuits should amount to one hundred. Vide vol. 14, page 747.

"'On February 24, 1869, the President proclaimed another treaty between the several tribes of Sioux Indians, to which the Ogalalla Sioux was a party, in which the United States granted large annuities, to continue for the period of thirty years to said tribes.

"'Of said annuities there remain unexpended and unappropriated fourteen annual instalments, each instalment being estimated at one million and a half of dollars, and the proportionate part of said Ogalalla Sioux is estimated to reach each year the sum of $400,000. Vide vol. 15, United States, page 635.

"'It will be observed that whilst the subsisting treaty between said Indians and the United States contained no special stipulations for indemnification of citizens of the United States who might suffer wrong at the hands of said tribe, yet it may be stated as a sound proposition of law, that such liability would necessarily attach to said tribe, from the relationship it bore to the Government, being under treaty with it to preserve peace with it, and to suffer no wrong to be done to it, or to its citizens, by said tribe or member of the same under its immediate control.

"'The commission of wrong necessarily carries with it the liability to make reparation for such wrong, especially when committed upon a citizen of the Government with whom treaty relations of friendship and amity exist, but

it may be further said, the statute "Regulating trade and intercourse with the Indian tribes, etc.," would fix the liabilities of said tribe for wrongful acts of its members upon citizens or inhabitants of the United States, by having in said treaty expressly acknowledged and recognized said tribe to be under the exclusive jurisdiction and authority of the United States, said statute having been designed not for any particular tribe of Indians, but is a general law for any tribe of Indians in amity, or under treaty relations, with the Government. * * *'

"543 of the claims submitted to Congress pursuant to the said act of March 3, 1885, were with the recommendtion that the same be disallowed, but the records of this Office do not show that in any of them, such disallowance was recommended because of a want of treaty provision to render the Indians liable therefor. Of 71 claims against Bannock Indians submitted to Congress, eight were not approved because of 'insufficient evidence,' and one because 'said claimant was then and there an intruder living upon the reservation of said Indians against the express orders of the Government Agent.' In submitting conclusions upon the meritorious claims against the Bannocks, the Department uniformly stated that said Indians were chargeable with claimants' losses under the first article of the treaty of July 3, 1868 (15 Stats., 673).

"The remaining two motions, inclosed with said communications, will be made the subject of a separate letter at a later date.

"Very respectfully,

"FRANK C. ARMSTRONG,

"*Acting Commissioner.*"

Office Supreme Court U. S.
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CLERK.

Supreme Court of the United States.

October Term, 1895.

ALVIN C. LEIGHTON
v.
THE UNITED STATES *et al.* } No. 413.

SUPPLEMENTAL BRIEF FOR CLAIMANT IN REPLY.

Upon the argument of this case the statement on page 5 of appellant's brief, that prior to the acts of 1859 and 1870, it had been the practice to pay such claims as they arose and were established, was questioned by the learned Assistant Attorney-General. The following are the appellant's authorities:

I. The acts of 1796, 1799, 1802 and 1834 (appellant's brief, pp. 69-72), provide for the payment of such claims from the Indian annuities, or from the Treasury. There is a presumption that payment was made. If payment had not been made as provided for, there would have been no need of the passage of the act of 1870 (appellant's brief, p. 74), forbidding future payments without special appropriation.

II. In the letter of the Secretary of War of March 13, 1816, printed on page 5 of appellant's brief, the existence of a practice of paying such claims is clearly stated.

W. A. Gorman, Governor of Minnesota and *ex-officio* Superintendent of Indian Affairs, September 30, 1854, says (Report of the Secretary of the Interior, 1854, p. 255):

"Heretofore I have been forbidden under a decision of the Indian Department at Washington, to either pay or allow to be paid any claim of our people for damage against Indians. It has caused much complaint among the settlers. By late instructions from the Indian Bureau I learn what is both gratifying to the people of Minnesota and myself, that payments can be enforced for such depredations as are above stated."

The report of the Commissioner of Indian Affairs for 1866 (seven years after the act of 1859), p. 18, recognizes that such payments were made out of money annuities.

"Some settled policy should be adopted in regard to depredation claims against Indians in particular cases. The law in force requires that where Indians are in 'amity' with the United States, a certain course shall be taken to present the claim to them for allowance, to be paid from their annuities if allowed, and if the tribe has annuities regularly due. The rule of the Department has heretofore been that only cash annuities could be thus used, funds appropriated for the purchase of goods not being held liable to be diverted for payment of claims against Indians. Of late the almost universal policy employed in our Indian treaties is to stipulate for no money annuities, but to make all payments in useful goods, or use certain amounts for beneficial purposes, thus leaving no Indian revenue subject to diversion in payment of claims against them. Another difficulty occurs which has been made the subject of a special report to the department in connexion with certain claims. The theory of the existing law is, that where a tribe is 'in amity' with the Government, and any of its individuals commit depredations, the tribe can have the opportunity of compelling its delinquent member to make restitution, or, upon the facts of the outrage being made apparent, of consenting to restitution from the common means of the tribe. But where peaceable relations are interrupted, from whatever cause, with a whole tribe, as was the case with the Arapahoes and Cheyennes in 1864, it is impracticable to present the claim to them for allow-

ance, and they can not be properly said to be 'in amity' with the United States, being in fact at war with the Government. Yet it is contended that, until by solemn act of Congress their treaties are declared abrogated and their annuities forfeited, as was the case with the Sioux of Minnesota, such tribes must be held as still, technically, 'in amity' with the Government. A decision of these points, and if deemed necessary, some special enactment of law applicable to the case, would relieve this office and the department of some embarrassments in cases of claims frequently presented."

In H. R. Rep. 3117, 49th Cong., 1st Sess., p. 28, a letter from the Commissioner of Indian Affairs of March 3, 1886, to Hon. J. N. Dolph, United States Senate, states:

"There are about. forty-five hundred claims on file on account of Indian depredations, dating from 1850 to the present time, and they aggregate in amount $13,000,000. Prior to the act of July 15, 1870 (see Revised Statutes, section 2098), claims against Indians for depredations were paid by the United States Indian agents. As to what amount was thus paid the office has not been able to ascertain. By an examination of the Statutes at Large beginning with the act of March 3, 1819 (3 Statutes, p. 517) and coming down to the act of March 3, 1885 (23 Statutes, 498), it will be seen that Congress has appropriated by special acts in payment of claims about the sum of $1,654,530."

The same report, p. 3, says:

"During all this period of time payments of claims for Indian depredations was made to a considerable extent by the Indian Bureau. After the act of 1859, the same course was followed in regard to claims against Indian tribes to whom annuities were due. If the claim was duly proved to the satisfaction of the Indian Bureau it was paid out of the annuities unless, as occurred in many cases, the annuities were not sufficient to supply the abso-

lute needs of the Indians. In that case the claims remained unpaid *ex necessitate*, though contrary to the law."

In H. R. Rep. 1079, 51st Cong., 1st Sess., p. 3, it is said:

"The guaranty of indemnification to its citizens was continued and re-enacted by the Government during various years and terms of Congress until the act of February 28, 1859. Up to that time all losses were regularly paid through the Departments upon proof being made to the proper officers. No recourse was had to Congress."

In Senate Rep. 1016, 51st Cong., 1st Sess., p. 6 (quoted in appellant's brief in the case of Marks *v.* The United States, No. 670, October Term, 1895, p. 66), the following statement is made:

"Thus it will be seen that from May 19, 1796, to February 28, 1859, a period of about sixty-three years, the policy of requiring the Indians to pay for the unlawful depredations committed by them against the whites, and of requiring the whites to pay for the unlawful injuries committed by them against the Indians, and an eventual indemnification to each class in case the effort to make the party committing the injury pay failed, was in active force, and payment for claims for Indian depredations was made out of the public treasury without special appropriation by Congress.

"After the passage of the act of 1859, such payments continued where the Indians had annuity funds, down to July 15, 1870, when, by an act approved on that date (16 Statutes, 360, section 2098, Rev. Stat.) it was provided that thereafter no claims for Indian depredations should be paid until Congress should make special appropriation therefor."

The distinguished counsel relies upon a statement in Sen. Ex. Doc. 117, 52d Cong., 1st Sess., p. 3, that there has been paid or otherwise adjudicated by the Secretary of the Interior before the act of May 29, 1872, only the

sum of $216,380.83. This is said to be so small an amount as not to warrant any conclusion of a general custom. The figures given in this report are immediately followed by a statement that under the authority of acts of Congress prior to March 3, 1885, payments have been made to the amount of $208,140.10. The latter statement is shown to be totally erroneous by H. R. Rep. 3117, 49th Cong., 1st Sess., p. 16, as follows:

"The following is a list of special appropriations for payment of Indian depredation claims. In each case it is stated whether payment is to be made from the Treasury or from the Indian annuities. The total of amounts appropriated from the Treasury is $1,604,028.25; the total appropriated from Indian annuities it $201,316.37. But these totals do not embrace the sums appropriated from the Treasury by several acts (March 2, 1827; May 31, 1830; June 30, 1834), in which the amounts are not specified.

This then details the several appropriations in the Statutes at Large supporting the above statements.

As so great an error is made on this point by the Secretary of the Interior in the report relied upon by appellee's counsel, it is not unreasonable to infer that the statement of the amount paid under Department orders prior to May 29, 1872, is equally unreliable. It is not probable that the records of the War and Interior Departments from 1796 are now accessible so as to show all of the payments made during this whole period, many of them being by Indian agents far removed from the seat of Government.

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